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DURING THE YEARS 1864, 1865 AND 1866.

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BY WILLIAM BARLOW, ESQ. & J. LOWRY WHITTLE, ESQ.

Common Pleas;

BY SAMUEL V. PEET, AND JOHN HEZLET, ESQ.

Exchequer;

BY CHARLES H. FOOT, ESQ.

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COMMON LAW REPORTS

OF CASES ARGUED AND DETERMINED IN

THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER,

Exchequer Chamber,

AND

COURT OF CRIMINAL APPEAL.

THE QUEEN, at the prosecution of the Commissioners of Public
Works in Ireland, Trustees of the Queen's College in the
borough of Cork,

v.

THE MAYOR, ALDERMEN, &c., and RECORDER OF CORK.

(*Queen's Bench.*)

H. T. 1863.

Queen's Bench

Jan. 26, 27,
30.

CERTIORARI.—The solicitor for the Commissioners, in his affidavit, stated that, on the 15th of May 1862, a portion of the Queen's College in the borough of Cork, with valuable fixtures, fittings, and other property, was destroyed by fire; the buildings, fixtures, and fittings being vested in the Commissioners, who, upon receipt of information that the fire was malicious, proceeded to take steps to recover compensation from the borough. The buildings and property had been in the care and under the superintendence of the president, Sir Robert Kane, who, on the day of the fire, made a

The Grand-jury Act made certain notices to certain public bodies and officers a condition precedent to obtaining compensation for malicious burning. The C. Improvement Act, as far as the city of C. was concerned, transferred the jurisdiction as

to compensation for malicious burning to the Town-council, and introduced various changes as to the powers and duties of the public bodies and officers mentioned in the former Act, which rendered an exact compliance with its provisions impossible. A, having applied to the Town-council of C. for compensation, was required to prove the service of these notices; and this decision was affirmed by the Recorder. A now applied for a *certiorari*.

Held that, though compliance *modo et forma* with some of the notice provisions had become impossible, yet those provisions had an ulterior object, with respect to which compliance might still be had in substance.

Held also that, though the performance of *all* the notice provisions might be rendered impracticable by subsequent legislation, the performance of those that were possible was still obligatory.

* Before the Full Court.

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deposition before certain Justices of the borough that he did not know by whom the College had been set on fire. On the 20th of May the Commissioners caused a written notice of the loss sustained by them, and of their intention to apply for compensation, to be served on the churchwardens of the parish in which the building is situate, on the high constable of the barony of Cork, on the rate collector of the borough, and at the police-station nearest to the College. In pursuance of the Cork Improvement Act 1852 (15 & 16 Vic., Loc. & Per., c. 143) the Commissioners, on the 26th of August, caused an application, under their hand and seal, for compensation, to be lodged with the town-clerk. At the meeting of the Town-council of Cork, which was held on the 9th of September, the deposition of the president, and the notices and application above mentioned, were given in evidence on behalf of the Commissioners; and evidence was tendered to show that the burning was malicious, and of the amount of damage. The Town-council however required evidence to be given of the *posting* on the police-barracks or court-house of the borough of the notice of the application, and of the notices above mentioned. The Commissioners declined to give that evidence, alleging that it was not necessary in a proceeding under the Cork Improvement Act. Thereupon the Town-council refused to hear any further evidence whatsoever, and peremptorily rejected the application on the ground that no evidence had been given of any posting of the notices or application. Notice was then duly served on the town-clerk, that the Commissioners would bring the matter of the application before the Recorder of the borough, on the 15th of September, at the time of fiatting orders of the Town-council. On that day the matter was postponed until the 1st of October, when the Commissioners' application to have their claim added to the schedule of applications lodged by the town-clerk with the clerk of the crown for the borough was resisted by some of the rate-payers. The same evidence as had been given before the Town-council was adduced, with the addition of the notice of appeal. On the 2nd of October, the Recorder peremptorily rejected the application, because evidence had not been given of the posting of the notice of application for

compensation. The Recorder declined to state on the face of his adjudication the precise point which he decided; but stated that if required he would state the precise ground of rejection on the return to a writ of *certiorari*. From a subsequent letter of his it appeared that his ruling entered in the order book was this:—
 “The Court considers that no order should be made to put applications 48 and 49 on the schedule,” and that “it did not go on to make statements of the why or wherefore.”

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Upon these facts, this Court, on the 18th of November 1862, granted a conditional order for a writ of *certiorari*, “directed to “the mayor, aldermen and burgesses of the borough of Cork, and “to Thomas Forsayth, Esq., Recorder of the said borough of Cork, “and to each and every of them, to remove into this Court all and “singular applications, notices, depositions, affidavits, orders, adjudications, records, and other proceedings of and concerning the “matter of an application for compensation for the malicious “burning of a certain building called the Queen's College, made “before the Council of the said borough of Cork by the Commissioners of Public Works in Ireland; and of and concerning a “certain application made by the said Commissioners, before the “said Recorder, in the matter of the said hereinbefore mentioned “application for compensation as aforesaid.”

The town-clerk of the borough filed as cause an affidavit, in which he stated that the Commissioners are only trustees of, and have no beneficial interest in the College, which was built out of the consolidated fund, and is supported by an annual grant; that they had adopted a form of application which had never been recognised by the Town-council or the Recorder as a substitute for the requirements of the 6 & 7 W. 4, c. 116, in respect of the notices and several acts by that statute required to be done; that the Recorder had refused to add the application to the schedule, because the Commissioners had declined to give evidence of the *posting* of the notices required by the 6 & 7 W. 4, c. 116, s. 135, which in fact never had been posted; that no deposition had been made by the vice-president, steward or gate-porter of the College, all of whom resided in the College when the fire happened; that on

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the 2nd of October the Recorder finally fiatd or otherwise disposed of the several applications appearing on the schedule, and that the equal rate had been levied by the Town-council in pursuance of the Cork Improvement Act.

The *Solicitor-General (Lawson)*, Sergeant *Sullivan, Brewster, De Moleyns*, and *May*, moved to make absolute the conditional order.

Three questions arise in this case: first, was it necessary to *post* the notices on the police barracks and court-house? secondly, does a building, erected at the public expense and continuing vested in public trustees, come within the 6 & 7 *W. 4*, c. 116? and, thirdly, was the president the proper person to make the deposition before the Justices? On the first question it was contended that the inconsistency between the 6 & 7 *W. 4*, c. 116, and the 15 & 16 *Vic.*, Loc. and Per., c. 143, was so great that the latter statute had by implication, *and so far as the borough of Cork was concerned*, repealed the former, so far as to render it unnecessary to *post* the notices; that is to say, had repealed its 135th section from the words "and like notices shall be posted" down to the end. The 15 & 16 *Vic.*, Loc. and Per., c. 143, s. 35, abolished the fiscal powers of the grand jury of the borough of Cork and Presentment Sessions. It has therefore become physically impossible for the secretary of the grand jury (who no longer exists) to "schedule applications for compensation;" for "the Presentment Sessions to "examine into the serving and posting of the notices of such "application;" for the chairman to indorse his opinion thereon; or for such secretary to deliver such "application so indorsed to the grand jury at the next Assizes;" or to comply at all with the remaining requisitions of the 6 & 7 *W. 4*, c. 116, s. 135. Therefore it is no longer necessary to go through the preliminary form of *posting* notices when the Presentment Sessions—the body to which was committed the duty of examining into and determining on the validity of such posting—has been abolished. Section 136 has been similarly repealed; but section 137 has been complied with, inasmuch as the president made a deposition before the Justices.—[FITZGERALD, J. Is there any provision in the

Grand Jury Act (6 & 7 W. 4, c. 116) which extends the meaning of the word "person," so as to make it include a "corporate body"?]—There is no express provision in the Act itself; but the point is concluded by authority: 1 *Black. Com.*, p. 468; *Croft v. Howell* (a); *The Corporation of Newcastle v. The Attorney-General* (b). The other sections of the 6 & 7 W. 4, c. 116, were then minutely criticised, to show the utter impossibility of obeying all its provisions in the borough of Cork. The entry made by the Recorder of his ruling having been read—[LEFROY, C. J. It is clear from that entry that the Recorder exercised his jurisdiction.—FITZGERALD, J. The only entry made by the Recorder is, that he declined to add Nos. 48 and 49 to the schedule. How can we say that he did not reject the application on the ground that the burning was not malicious? Can we travel out of the order which he made?]—The affidavits admit that the application was rejected on a point of law. The ruling is erroneous in point of law, and this Court is bound to review it.—[FITZGERALD, J. Is that so when we are dealing with the final order of a Court of Record? for the Recorder has all the power of a Judge of Assize; and the case is just the same as if a Judge of Assize had refused his fiat.]—The merits of the applicant's case were not even gone into; and he is not then to be debarred from having the decision of an inferior tribunal on a point of law reviewed by this Court. If the Town-council, an inferior tribunal not of record, ought to have entertained the application and gone into its merits, the Recorder's decision must be equally wrong. If the writ cannot be granted in this case, then it will be impossible to review the decision of any Town-council in Ireland. It may be said that *In re Codd* (c) decided that it was necessary to post the notices mentioned in the first part of section 135. That was a mere decision on Circuit, and therefore ought not to be followed if erroneous in point of law. Moreover, it is quite consistent with the statement of facts in that case that the notice, posting of which had been

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(a) Plow. 538.

(b) 12 Cl. & Fin. 402.

(c) 4 Ir. Jur. 243.

H. T. 1863. omitted, was the notice of application to Presentment Sessions. If
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 THE QUEEN so, that decision was correct, but is beside this case; the latter part
 v. of the section having been repealed. That decision professes to be
 RECORDER founded on *In re Black* (a), which does not touch this case at all,
 OF CORK. because there the party had omitted to *serve* at the police station the
 first notice mentioned in section 135. The Commissioners therefore
 have complied with every unrepealed provision of the Grand Jury
 Act.

As to the second question, it was admitted that *Onslow v. Smith* (b) ruled this case in favour of the Commissioners; and, on the third question, *Lowe v. Hundred of Broxtowe* (c) was cited to show that the president, having had the care and superintendence of the property and buildings, and being the person who represented the Commissioners, answered the description of "servant," in the 6 & 7 W. 4, c. 116, s. 137, and was therefore the proper person to make the deposition.

Whiteside, C. R. Barry, and Waters, contra.

The Court cannot go behind the ruling of the Recorder, which is equivalent to a Judge's fiat, and has been made in the exercise of a lawful jurisdiction. "A *certiorari* does not issue to correct the exercise of a lawful jurisdiction, but to correct what has been done under a want of jurisdiction, or in excess of jurisdiction." *The Queen v. Justices of the county Armagh* (d); *In re James Quinn* (e); *Ex parte Richard Henn* (f).—[FITZGERALD, J. But in the *County Mayo Presentments case* (g) this Court quashed a number of presentments, which had been *fiated*, for errors apparent on their face.—O'BRIEN, J. In that case the distinction was taken by the Court that the errors appeared on the face of the presentments; but the Court adhered to the rule that they would not go into affidavits to point out any other defects.]—The only exception to the rule of not going into such a case on affidavits is, where

(a) 1 Cr. & Dix. Cir. Cas. 363

(b) 3 Doug. 348.

(c) 3 B. & Ad. 550.

(d) 6 Ir. Jur., N. S. 224.

(e) 9 Ir. Law Rep. 160.

(f) 6 Ir. Com. Law Rep. 239.

(g) 7 Ir. Jur., N. S. 96.

Justices who are personally interested in the matter take part in the decision. The Court should not exercise its discretion in favour of the Commissioners: *The Queen v. Manchester and Leeds Railway Company* (a).—[O'BRIEN, J., referred to a like case under the Railway Statutes, *In re Penny* (b).]—Besides, it would be futile to issue the writ, because the rate has been actually levied and the time limited by the statute has elapsed; so that, even if the writ was followed by a *mandamus* to add these applications to the schedule, the object could not be attained. No error can possibly appear on the face of the Recorder's ruling on a return to the writ. If the Commissioners had elected, under the 6 & 7 W. 4, c. 116, s. 140, to make their application in the next county, they could not have succeeded without proving that the notices had been posted; so that the latter part of the 6 & 7 W. 4, c. 116, s. 135, has not been impliedly repealed. There must be a *cy-pres* construction of that statute, so far as it relates to Cork. What is impossible need not be done; but every act which is possible must be performed. This *cy-pres* doctrine has been applied to the 9 & 10 Vic. c. 93, s. 4, which enacted that a bill of particulars shall be delivered together with the declaration.—See *Quinn v. O'Keeffe* (c). There is no declaration in Ireland; but nevertheless a bill of particulars must be delivered along with the plaint. *Croft v. Howell* (d) does not apply, because it was a decision on a remedial statute; whereas in matters of this nature, the 6 & 7 W. 4, c. 116, is a penal enactment, having for its chief object the discovery and punishment of the offenders. For that purpose the deposition is required to be made; and the object of requiring the notices to be posted was to give to the public protection against fictitious applications. By means of these notices, the rate-payers, who would have to pay the compensation, would get timely notice that the application was to be made—would be able to sift the case, and would be prepared to resist it if they found that the demand was fictitious or unjust. *In re Black* (e) shows that even a Judge at Assizes has no power

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(a) 8 Ad. & Ell. 413.

(b) 7 Ell. & Bl. 660.

(c) 10 Ir. Com. Law Rep. 393.

(d) Plow. 538.

(e) 1 Cr. & Dix. Cir. Cas. 363.

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to review the decision of Presentment Sessions as to the preliminary point of posting the notices; and *In re Codd* (a) shows that the 135th section is mandatory in requiring the notices to be posted. The present application has been made under the 6 & 7 *W.* 4, c. 116, or it has not. If it has not been made under that statute, it must fail utterly; for the 15 & 16, *Vic. Loc. and Per.*, c. 143, gives no right to make such an application. If however they apply under the 6 & 7 *W.* 4, c. 116, its enactments should have been obeyed. The necessity of giving the public notice of these applications has existed ever since the passing of the first Grand Jury Act, 7 *W.* 3, (*Ir.*), c. 21. The 6 & 7 *W.* 4, c. 116, has not been repealed by implication: "for the law does not favour or repeal by implication, "unless the repugnance be quite plain; and such repeal carrying "with it a reflection on the wisdom of former Parliaments, it "has been confined to repealing as little as possible of the former "statute"—*Dwar. on Statutes*, p. 533; *Forster's case* (b). The 15 & 16 *Vic.*, *Loc. and Per.*, c. 143, effected nothing but the substitution in the borough of Cork of the Town-council for the grand jury. Therefore, since its 37th section enacts that the Town-council may levy rates for the purposes for which the grand jury "might lawfully have made provision," the applicants are not relieved from the necessity of posting these notices, without proof of which the grand jury could not lawfully have granted compensation. Furthermore, the president was not the proper person to make the deposition, which should have been made by the other persons mentioned in the town-clerk's affidavit: *The Duke of Somerset v. The Inhabitants of More* (c); *Keshan v. Armstrong* (d). *Lowe v. Inhabitants of the Hundred of Broxtowe* (e) is not in favour of the Commissioners, because our affidavit shows that, not the president, but the other persons named were specially charged with the care and superintendence of the buildings and property.

Sergeant *Sullivan*, in reply.

If this writ cannot issue, the Town-council and Recorder of Cork

(a) 4 *Ir. Ju.* 243.

(b) 11 *Rep.* 63 a.

(c) 4 *B. & Cr.* 172.

(d) 1 *B. & Ald.* 146.

(e) 3 *B. & Ad.* 550.

may, on grounds untenable either in law or in fact, reject applications of this nature, and the applicants will have no mode of obtaining redress.—[LEFROY, C. J. When an Inferior Court has exercised its jurisdiction, and nothing appears on the face of the proceedings to show that the judgment was erroneous, can this Court issue a *certiorari* to review that judgment, on the ground that certain affidavits state it to be erroneous in point of law?—The very purpose of the *certiorari* is to review judgments for errors in law; and the Commissioners allege too that error in law will appear on the face of the proceedings when a return is made by the Recorder, who has promised to state therein the ground on which he rejected the application.—[O'BRIEN, J. The Recorder cannot in his return make the minute of his ruling different from what it was when he entered it in the presentment book.]—He must on the return set out all the proceedings.—[LEFROY, C. J. No doubt he must furnish to the Court everything that passed.]—Certainly, the Court is not to be foiled in that way; nor can the Court presume that the Recorder will keep back his reasons so as to deprive the applicants of their right. When the return is made will be the proper opportunity of discussing the Recorder's order. In the case of *In re Penny* (a) the excess of jurisdiction was shown by affidavit, and no error appeared on the face of the proceedings.—[O'BRIEN, J. In that case the tribunal had no jurisdiction at all.]—It has been urged that the writ, if issued, will prove futile, because the time for striking a rate has elapsed. But this Court will follow up the *certiorari* by a *mandamus* to compel the performance of the necessary acts, notwithstanding the lapse of the period limited by statute. “We are of opinion . . . that “the Court of Queen's Bench ought to compel the performance of a “public duty by public officers, although the time prescribed by “statute for the performance of it has passed; and if the public “officer to whom belongs the performance of the duty has in the “meantime quitted his office, and has been succeeded by another, “we think it is the duty of the successor to obey the writ, and to do “the acts, when required, which his predecessor has omitted to

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(a) 7 Ell. & Bl. 660.

H. T. 1863. "perform:" *The Mayor of Rochester v. Regina* (a).—[FITZGERALD, J. The case most analogous to this is that of a Judge of Assize refusing on erroneous grounds to fiat a presentment. Is there any precedent of a *certiorari* having been granted to remove the minute of his refusal?—The Court should make a precedent, as was done in *The Mayor of Rochester v. Regina*. There can be no greater error than to prevent an applicant giving evidence to support his case on the merits, on the erroneous ground that the notices should have been posted.—[FITZGERALD, J. Should not your motion then be for a *mandamus*?—No; for the Recorder's order must be quashed before the Commissioners can move for a *mandamus* to compel the Recorder to hear the appeal again.—[LEFROY, C. J. If the Recorder did not perform his duty, is not that a case for a *mandamus*, though no doubt his refusal is in one sense erroneous?—FITZGERALD, J. The difficulty seems to be that the Recorder has heard the appeal, and exercised his jurisdiction by refusing to add Nos. 48 and 49 to the schedule, because the appellants failed in the proof of what he considered to be an essential part of their title.]—Suppose that these notices, according to the true construction of the two statutes, need not have been posted, and that the Recorder in the return to the writ states that he rejected the application because no evidence of posting the notices was given, is that order to stand?—[FITZGERALD, J. If an Appellate Court refuses to hear an appeal, surely a *mandamus* is the appellant's remedy?—At Quarter Sessions perhaps that might be so. But here the matter is finally disposed of by the Recorder's order; and henceforward it will be law in the borough of Cork that these notices must be posted, unless the order is removed and quashed. On the present motion it is only necessary to establish that to post these notices was unnecessary; and this Court should be vigilant and astute to keep the judgments of Inferior Courts accurate in point of law. Statutes cannot be construed by the *cy-pres* doctrine: *The Queen v. Salomons* (b). So also it was necessary to pass a special Act of Parliament enabling the Courts of Common Law in Ireland to issue charging orders as

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(a) 4 Jur., N. S. 1230 (*per* MARTIN, B.)

(b) 7 Ex. Rep. 559.

against funds in the Landed Estates Court, though they had that power with respect to funds in the Incumbered Estates Court. It is impossible to import into the 15 & 16 Vic. (Loc. and Per.), c. 143, the words which render the posting of the notices necessary; and yet that is the Act from which the Town-council and Recorder derive all their authority.—[FITZGERALD, J. One reason why the Legislature may have thought it well to dispense with posting of public notices, if they have done so, may have arisen from the different natures of the tribunals. The grand jury was nominated by the High Sheriff; whereas the Town-council is elected by the ratepayers, whose interests it is the Town-council's duty to guard].

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— *Cur. adv. vult.*

LEFROY, C. J.

This case comes before the Court upon a motion of the *Solicitor-General* to make absolute a conditional order for a writ of *certiorari*, obtained on behalf of the Commissioners of Public Works, to bring up the proceedings which took place before the Corporation of the city of Cork, in respect to an application by the Commissioners of Public Works requiring to have put upon the schedule charges to be provided for by the Corporation, for such purposes as the 6 & 7 W. 4, c. 116, and the further Act for the Improvement of the borough of Cork, had pointed out. The jurisdiction vested in the grand jury under the 6 & 7 W. 4, c. 116, of providing compensation for malicious injuries, was exercised by the grand jury at Presenting Sessions under the direction of the Judge of Assize. By the latter Act that jurisdiction was transferred to the Mayor, Corporation, and Recorder of the city of Cork, to be thenceforth exercised by them. The order required them to transmit here all the proceedings which took place before them on the occasion of an application made to that body, which is now entitled in the city of Cork to exercise the jurisdiction of providing compensation for malicious injuries done to property there. The subject-matter of the application in this case was one of the Queen's Colleges in Cork, which appears to have been burned; and the application was made upon the ground that it was a malicious burning—a burning for some malicious purpose or some malicious motive, and that therefore the Commissioners

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of Public Works were entitled to have redress—such redress as they would have been entitled to claim under the 6 & 7 W. 4, c. 116. The question therefore is, whether they would have been entitled under that Act to compensation for this injury, supposing it to be a malicious injury by burning? In fact it comes to this, whether the transfer of the jurisdiction as to granting the compensation annulled the provisions of the 6 & 7 W. 4, c. 116, according to which alone compensation could be granted under that Act?

Several questions, upon which a good deal of discussion took place, were made during the argument; upon them it is not necessary for us to now express any opinion. The case is narrowed to the single question of law arising on admitted facts. But, with respect to one question, whether the writ of *certiorari* is applicable to a case of this sort, although I for one have an opinion upon that subject, it is not necessary to express any opinion. We shall decide the case; and we have come to an unanimous opinion upon it, so as to decide it as if we had all the proceedings before us, with all the solemnity of a return to the writ of *certiorari*. The consent of the parties to produce the original record of the proceedings, and their admission as to matters of fact, bring the case before us to the narrow question, whether it was necessary to have proved, in order to entitle the applicants to compensation, the service and posting of all the notices which, under the 6 & 7 W. 4, c. 116, it would have been necessary to prove in the case of an application under that Act to the grand jury at Presenting Sessions before the Judge?

Now it is plain that there are some provisions with respect to this notice existing, which, though there would have been no difficulty in complying with them under the 6 & 7 W. 4, c. 116, have, either by subsequent legislation or subsequent alteration, either in law or fact, of the state of things since that Act passed, become impossible. But the question is whether, since the compliance *modo et formâ* with some of these notices has become impossible, the service of these notices had not an object quite beyond that for which it was contended in the argument that they were appointed; and whether they had not an ulterior object in respect to which a compliance may still be had in substance, and with a literal exactness

still? That leads us to a consideration of these notices, to see what was the substantial object with which they were appointed to be served, as they were, by the Grand Jury Act, and whether that object—the reason of that appointment—does not exist now for the service of them, as far as it was possible to serve them, as strongly as at the time when the services were originally appointed to be made. We shall best arrive at a conclusion on that question by considering this jurisdiction of giving compensation for malicious injuries, and considering what were the objects to be obtained by these provisions. I think there were three objects which the Legislature designed to attain by the provisions which they made by the statute. The first was compensation to the party whose property was so maliciously injured; secondly, to enable the offender to be discovered—to facilitate and insure, as far as possible, the discovery of the offender who committed the malicious injury; and, thirdly, to guard the public and the ratepayers against the substitution of a feigned and pretended malicious injury, under the cloak of which it might be attempted to get compensation from the county for the party whose property really had not been maliciously injured, but who himself might have been the injurer of it, with a view to get a compensation for it which he could not have got in any other way. The Legislature designed to attain these three objects; and that the provisions of the statute were made with a view to the attainment of these three objects will appear, not only from the provisions of the statute itself, but also from the proceedings which have taken place upon the statute. With respect to these three objects nothing that has occurred in the transfer of the jurisdiction from the grand jury, the Presenting Sessions, and the Judge of Assize, to the Mayor, Corporation and Recorder of the city of Cork—nothing in the Act transferring the jurisdiction has taken place to annul or abrogate those provisions, so far as they were calculated to secure the protection of the ratepayers and the discovery of the offender; and the securing that compensation should be given only to parties who complied with the provisions of the Act, which were inserted for the purpose of obtaining substantially the three objects to which I have adverted. Now, what were the provisions of the Act as to notice?

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Notices of the intention to apply for compensation were to be given; notices were to be given to certain persons (the churchwardens) representing the ratepayers of the district where the burning occurred; the notice was to be given to the barony constable. It is said that there is not now any barony constable; that the alterations in the police have rendered that service impossible. Be it so; and if the case turned upon the non-service of the barony constable, it might be said in strictness that that could not be complied with. At the same time, if it were necessary, I think a solid argument might be sustained to prove that where persons were substituted for the barony constable, the service upon them would be a substantial compliance with the Act. But it is not necessary to go into that consideration; for it does not follow that, because you cannot comply with the whole of the provisions of the Act, you may dispense with such of them as you may and can comply with. What then are the provisions with which the applicants might have complied? They might have made a service upon the churchwardens and police; they might have posted their notices on the police barracks. There was an important provision to be complied with; and accordingly there is not only a peremptory, a mandatory direction that every applicant for redress of this sort *shall* serve the notices to which I have adverted in the manner and form there appointed—not only is there a mandatory order that these notices *shall* be so served and posted, but there is in a subsequent section a proviso that no compensation shall be granted *unless* the directions to these several notices had been complied with; and it is a special direction to the Presenting Sessions in the first instance to ascertain whether these provisions in the Act have been complied with, and to make a report upon that matter.

Then it is said that the Presenting Sessions no longer exist in the borough of Cork, and that therefore it is not necessary to serve or post these notices, because the claim is not to go before the Presenting Sessions. But, at any stage of the proceedings, after it had passed the Presenting Sessions, after it had received the Judge's fiat, there might have been a traverse of

the presentment by any ratepayer ; and the first fact necessary to be proved on that traverse would be the service and posting of these several notices. That traverse is not taken away by the Private Act, 15 & 16 Vic. (Loc. and Per.), c. 143, for the administration of this law in the city of Cork. That traverse still subsists. Are we to suppose, when it exists now as it existed then, that it would be sufficient, on a traverse taken under the Grand Jury Act, that there was a presentment passed by a Presenting Sessions, and filed by the Judge? No ; but the applicant must have shown upon the traverse then, as he must still show, that these notice provisions of the Act were complied with. I admit that the provisions requiring the party to go before the Presenting Sessions in the city of Cork no longer exist. But he must go before the Corporation to get a decision upon the question of his right to compensation. The decision of that body might be traversed ; and under that traverse proof must as theretofore be given of the facts. The sophism by which it was attempted to be argued that these notices were no longer necessary acts—being acts to a certain extent that could not be complied with—took for granted that the only object of these notices was in reference to particular matters. They did not include in their view that the notices were intended for the purpose not merely of being served in any particular manner, but for the sound and substantial reason that the public (the ratepayers), who were interested in ascertaining that it was *bona fide* a malicious injury, not a feigned and pretended one, committed by the party for his own purposes, might be informed—nay more, that there might be a facility in finding out and discovering the offenders by giving publicity to the offence, and stating all the circumstances which were required to be stated in an information upon oath, either by the party or by those of his servants who were most competent to give that information. The information was of course lodged in the public offices, where everybody had access to it, and might be enabled more or less, from the description to be had of the offender, or the circumstances that are sworn to have taken place at the time, to have got information ; and thus not only have given facility for the discovery of the offender, if the offence was a genuine one, or at all events have enabled the

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Queen's Bench it was a *bona fide* malicious injury, or only a pretended one. That
 THE QUEEN was the real object for which these notices were appointed, and the
 v. ground upon which, by the proviso in the subsequent section, it was
 RECORDED made beyond all question a *sine quâ non* that these provisions as to
 OF CORK. notices should still be complied with; for upon the non-compliance
 with them there was an end to the jurisdiction—to the right to
 charge the county for any compensation, however malicious the
 injury may have been. Looking therefore to the peremptory nature
 of what was to be done under that and under the subsequent sec-
 tions, and regarding the proviso negating the party's right to get
 compensation unless these provisions had been complied with, the
 very moment you take away the service of these notices, or the
 compliance with respect to them so far as it was possible, you take
 away all jurisdiction whatever to grant compensation. Be the injury
 ever so clearly established, these provisions were in the nature of
 conditions precedent; and there can be no question that in point
 of law a jurisdiction, pointed and qualified by a condition precedent,
 falls to the ground the moment you show a default of compliance
 with the condition.

I wish upon this subject to refer to the opinions, entitled to the
 greatest weight, of two Chief Justices, Bushe and Doherty, upon
 the necessity of the service of these notices to entitle the party—
 how clearly soever he may establish the fact of the malicious injury
 —the absolute necessity for the party who would entitle himself to
 compensation, to prove the service of these notices. The passage to
 which I refer occurs in Mr. Foote's work on the *Grand Jury Laws*,
 p. 118, and also *In re Black (a)*; it is the judgment of Do-
 herty, C. J., upon a consultation with Bushe, C. J.; and that joint
 opinion is in terms that the non-compliance with the provisions of
 the Act, as to the service of these notices *modo et formâ*, was a
 disqualification of the parties to get compensation for a malicious
 injury done by fire.

Well then what is there in the transfer of the jurisdiction to
 make it less important now than it was then? If there was only

(a) 1 Cr. & Dix, Cir. Cas. 363.

this one provision, namely, that under the transferring Act any ratepayer may traverse the presentment—everything that was formerly required to be proved upon the traverse must still be proved; for the ratepayer is as much entitled under the transferring Act to traverse after the Recorder has exercised his jurisdiction as he was before that Act, after the jurisdiction had been exercised by the Presenting Sessions and the Judge of Assize. The ratepayer was then entitled to insist upon the non-compliance; and that was at once a flat bar to compensation. The argument therefore that, because some of these provisions could not be complied with, therefore the party was freed from the necessity to comply with any of them, appears to be unfounded, after a consideration of the objects which the Legislature had in view when they inserted these provisions in the statute.

Upon these grounds it appears to us that the decree of the Recorder in refusing to put this demand upon the schedule of rates was right; that he exercised a sound judgment, and that therefore if we had the case before us in the most solemn manner upon the return to the writ of *certiorari*, we should come to the same conclusion; and we think it is unnecessary to go through the mere form of granting the writ, when we have everything before us now which the writ could furnish. Upon a consideration of all these matters we are clearly of opinion that the transfer of the jurisdiction did not annihilate the provisions of the Grand Jury Act, so far as it was practicable to comply with them; and we think it was practicable by service of these notices, and by posting them in the manner I have described. There is a default therefore in that respect; and, by reason of his non-performance of the conditions precedent, the party is disentitled to compensation.

I may add that we have the authority of my Brother FITZGERALD for saying that he entirely concurs with our judgment.

O'BRIEN, J.

I concur in the judgment pronounced by my LORD CHIEF JUSTICE, that the conditional order for a *certiorari* should be

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discharged on the ground that the applicants have not complied with the provisions of the Act of Parliament as to the *posting* of the notices of intention to apply for compensation. Several other objections were relied on against our granting the writ. It has been urged (amongst others) that the remedy by *certiorari* is not at all applicable to a case where the tribunal below have refused upon some legal ground to grant a presentment. If it were requisite to decide this point, there would in my opinion be considerable difficulty in establishing that, in such a case as the present, we should grant the writ, even though we differed from the Court below as to the legality of the ground upon which they refused the presentment. It is not however necessary to give any decision upon this or some of the other questions raised in the case, because in our opinion the Recorder was right in holding that the *posting* of the notice was an essential condition precedent to the granting of the presentment; and that, as such condition had not been complied with, the application for compensation was properly rejected.

If this was the case of an ordinary application at the Assizes for compensation under the Grand Jury Act (6 & 7 W. 4, c. 116) I think it clear, from the express provisions of the statute itself, and from the cases cited in the argument, that the *non-posting* of the notice would have been a fatal objection to the application. The 135th section of the Grand Jury Act provides (amongst other things) that, within six days after the commission of the offence or injury complained of, the party intending to apply for compensation "shall serve notice in writing of such injury, and of such his intention, upon the high-constable of the barony and the churchwardens of the parish, and at the nearest police station; or, if there be no churchwardens, upon two of the principal inhabitants of the parish wherein such offence shall have been committed." This provision, it will be observed, relates to *the service* of the notice; but the previous 11th section of the same Act provides "that all notices required by this Act shall be promulgated by advertisements affixed on or immediately adjacent to the doors of every police

"station or barrack, and at the places (if any) appointed by the "grand jury for posting of notices within each parish." Now it is clear that this latter provision applies to and includes as well the notice required by the part of the 135th section to which I have already referred, as any other notices required by the Act; and that accordingly the said notice should not only be *served* under the 135th section, but should be also promulgated or posted under the 11th section. There are obvious reasons on grounds of policy, as stated by my LORD CHIEF JUSTICE, for these several provisions having been made by the Legislature for the purpose of ensuring publicity to all such applications for compensation. I may observe (amongst others) that the service upon two principal inhabitants of the parish may be perfectly valueless for the purpose of ensuring publicity, except it was also posted or promulgated in some manner that would make it matter of notoriety, and give to parties interested the opportunity of resisting the application.

The Counsel for the Commissioners however contend that, whatever might be the rule in the case of an application for compensation before a grand jury, under the Grand Jury Acts, the question is different in the present case, which is one of an application to the Town-council of Cork, under the Cork Improvement Act of 1852 (15 & 16 Vic., c. 143, Loc. and Per.). The 35th section of that Act declares that the powers of the grand jury of the county of the city of Cork, as to the appointment of Presenting Sessions and the presenting and levying of rates and cesses for any purpose, shall cease and determine. And, by the 37th section, the Town-council of the borough of Cork are empowered to raise off the borough, by means of a rate for general purposes, such sums as should be required in order to make provision for such purposes as said grand jury, but for that Act would, with or without previous application to Presentment Sessions, be bound or empowered to make provision for out of the rates, &c., except for the purpose of making, enlarging, &c., any street, road or passage, within said borough. Under that section the payment of compensation awarded for malicious injury would be one of the purposes for which such rate for general purposes would be applicable, as it was one of those for which said grand jury might

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have previously made provision. But the Commissioners' Counsel contend that the provisions of the Grand Jury Acts, with respect to the mode of proceeding in applying for such compensation, were not incorporated in the Cork Improvement Act; and that, even supposing it was still necessary to comply with any of those provisions, it was not necessary to do so with respect to such provisions as involved or supposed the existence of Presentment Sessions; and further, that as the 11th section, relative to the posting of notices, provides, in a subsequent part of the section, that they should be delivered ten days previous to the holding of the Presentment Sessions, the provisions of that section do not affect an application under the Cork Improvement Act, inasmuch as, according to that Act, Presentment Sessions cannot any longer be held within the borough. I do not concur in this argument, even assuming that the provision in the 11th section, for delivering notices ten days before the Sessions, applies to all the notices which by the first part of that section are required to be posted; it by no means follows that, because that mode of fixing the time is no longer applicable, we should therefore hold that the entire provisions of that section as to the promulgation or posting of notices, and the securities which the Legislature thereby provided for giving publicity to applications for presentments, are no longer in force. That time was fixed, because the applications were first considered by the Presentment Sessions. Under the Cork Improvement Act, the Town-council unite, in a certain degree, the functions both of the Presentment Sessions and of the grand jury; and would it not be more reasonable to hold that what was required to be done, in case of presentments by grand juries, a certain period before the holding of Presentment Sessions, should be done in the borough of Cork the same period before the meeting of the Town-council for considering such applications? It is true that the provisions in question which are contained in the Grand Juries Act are not incorporated in terms in the Cork Improvement Act; but, upon considering the two Acts together, it will I think clearly appear that we cannot hold that all such provisions in the former Act as are not expressly incorporated in the latter Act are therefore no longer in force as to

presentments in the borough of Cork. If this were so, it would follow that the provisions of the 136th section of the Grand Jury Act which prescribe a limit for the time at which a presentment for compensation for malicious injury should be made (namely, the Assizes next after the Sessions at which the application was made) would no longer have any effect for the borough of Cork, because the time prescribed by those provisions was fixed with reference to the time for holding the first Presentment Sessions next after the commission of the injury; and that, accordingly, there would be no limit to the time within which such application might be made to or granted by the Town-council. I need not point out the consequences of this result, or how completely it would frustrate the manifest policy of the Legislature. It would be obviated by holding (as I have already observed with respect to the 11th section) that the provisions of the 136th section should be carried out in the borough of Cork, by substituting the first meeting of the Town-council for that of the Presentment Sessions, as the period with reference to which time should be computed. There are several other inconveniences and difficulties (some of which were referred to in the argument) which would result from our holding that the provisions of the Grand Jury Act as to the form of procedure in applications for compensation are no longer in force in the borough of Cork, because not expressly incorporated in the Cork Improvement Act, and because the time within which they should be performed cannot be fixed in the precise time prescribed by the former Act. I admit that, in construing the two Acts together, we should hold that any provisions in the former Act which are altogether inconsistent with and repugnant to those of the latter Act are impliedly, though not expressly, repealed, so far as regards the latter Act; but we should not apply the doctrine of repeal by implication to those provisions and conditions which, for obvious purposes of policy, were required by the former Act, and which might, without inconvenience or repugnance, be substantially complied with in proceeding under the latter Act. With respect to the notice now in question which, under the 135th section of the Grand Jury Act, should have been *served* within six

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H. T. 1863. days after the injury or offence was committed, and which, under
Queen's Bench the 11th section of the same Act, should also have been *posted*,
 THE QUEEN there would be no inconvenience or repugnance in holding that
 v. in proceeding under the Cork Improvement Act such notice should
 RECORDER be posted at the time that it was served, although the further
 OF CORK. provision in the 11th section that such notice should be deli-
 vered ten days previous to the Presentment Sessions would no
 longer be applicable in terms.

It is also to be considered that the power of the Town-council to award compensation for malicious injury is derived by them, not from any express provision to that effect in the Cork Improvement Act, but from the 37th section, already referred to, which gives them in general terms the power to levy the rate for general purposes, and apply it for such purposes as the grand jury might have done. Under this section, they have therefore no greater power than the grand jury had, and no power to award compensation in a case where the grand jury could not have done so. If then the posting of the notice was an essential condition to the legal granting of such a presentment by the grand jury, it would appear inconsistent with this 37th section to hold that the Town-council might grant the presentment, though that condition was not complied with—that they might do what the grand jury could not have done. It is therefore for the Commissioners' Counsel to show that this condition is no longer requisite because the provision requiring it has been repealed, either expressly or by implication; and I am of opinion, for the reasons already stated, that it has not been so repealed.

HAYES, J., concurred in the judgment of the Court.*

* See *In re Tobin*, Rules, Orders, and Reserved Cases, 1860-1864, p. 2.

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 v.
 THE JUSTICES OF THE COUNTY OF WICKLOW.*

April 23.

E. A. DENNIS and R. H. Courteney, two of the Justices of the Peace in and for the county of Wicklow, in obedience to a writ of *certiorari*, returned into Court (among other documents) three convictions against Thomas Donegan.† The return also set out the evidence at great length; but the Reporter finds it unnecessary to do so, because, in the course of the argument for the defendants, it came to be admitted that the convictions could not be supported unless they merely amounted to "orders." The Reporter has also omitted all the arguments except those which related to the single point mentioned above.

The case having been set down upon a *concilium* for argument, on objections taken by the prosecutor to the convictions, those objections were now supported by—

Gibson (with whom was *Thomas Harris*).

These three adjudications are "convictions:" *Lev. Justice of the Peace*, p. 147, and the 14 & 15 *Vic.*, c. 93, s. 21. Whether the statute under which they were made actually denominates them "convictions" or not, is of no consequence: *Paley Conv.*, p. 131; *The Queen v. The Justices of Radnorshire* (a). They have been made under the 14 & 15 *Vic.*, c. 92, s. 9, clause 7, which only enables Justices to fine or to imprison. The Justices must inflict one or other of these punishments. The selection is left to their discretion; but they *must* exercise that discretion in each case,

Certiorari.—The Summary Jurisdiction Act (14 & 15 *Vic.*, c. 92, s. 9, clause 7) makes a party convicted thereunder liable to fine or imprisonment. D. being convicted under this clause, was sentenced to a fine of £5 or to be imprisoned for three months.—

Held, bad, as it was the duty of the Justices to make the selection of the penalties.

Held also, that, though bad in part and good in part, the sentence could not be amended by omitting the part bad. inasmuch as the adjudication was not an order but a conviction.

(a) 9 D. Pr. Cas. 90.

* Before the Full Court.

† See over.

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and pronounce in positive terms *which* punishment they inflict. Instead of doing so, they have left the selection of the punishment to the prisoner. The convictions therefore cannot be supported under that statute. The only other statute which empowers Justices to award imprisonment, in default of the payment of a fine, is the 14 & 15 *Vic.*, c. 93, s. 22, clause 1; which, however, does not help them in this case, inasmuch as the subsequent clauses of that section deal with the modes of enforcing the punishment, and make the issuing of a distress-warrant for the amount of the fine a condition precedent to the substitution of imprisonment in lieu of the fine. It is only upon failure to realise the amount of the fine by a distress that a jurisdiction to substitute imprisonment for fine is created. But, even if the Justices had complied with the provisions of this section, still the first conviction shows on its face an excess of jurisdiction, because in it they have, in lieu of a fine of £5, awarded *three* months' imprisonment; whereas imprisonment for *two* months is the longest term which the statute authorised them to inflict in lieu of a fine of that amount.

Tandy (with whom was *Sidney*) contended that the adjudications were simple orders, and nothing more. The 14 & 15 *Vic.*, c. 93, s. 21, clause 1, enacts that the *substance* of the decision of the Justices is to be entered in the *order-book*. The Lord Lieutenant in council has power to alter the form of order given by the statute; so that the entries in the order-book are, not formal convictions, but merely memoranda of what business is done. It follows that, even if in the order-book there appears a punishment which in part is not warranted by law, the unwarrantable part is severable from the rest, and may be quashed, while the remainder stands good. The only order made is that in column No. 7, which is quite distinct from the rest of the entry: *Ex parte Coley* (a); *The Queen v. Robinson* (b); *Lev. Justices' Manual*, p. 200. There is no law which requires that such adjudications shall be made up as convictions: as orders they are equally binding and operative: the order-book shows that they are actually called *orders*, and the Court will not, so as to

(a) 4 New Sess. Cas. 507.

(b) 17 Q. B. 466.

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embarrass the Justices, go out of its way to call them "convictions." A "conviction" must set forth on its face the evidence, and be under seal.—[LEFROY, C. J. What do you take to be the essential distinction between a "conviction" and an "order"?]—The answer to that question is given in *Paley Conv.*, p. 131:—"The only criterion afforded by these cases for distinguishing when penal proceedings are to be considered as orders, and when as convictions, is that alluded to by Lord Hardwicke, viz., whether they be so denominated by the statute." Now the 14 & 15 Vic., c. 93, s. 21, in terms designates the entries "orders."—[O'BRIEN, J. The terms of the Summary Jurisdiction Act (14 & 15 Vic., c. 92, s. 21) go far to show that the word "conviction," used in that section, applies to all cases where a party is found guilty of any of the offences previously mentioned in that Act; and the 37th section of the Petty Sessions Act (14 & 15 Vic., c. 93) enacts that "in summary proceedings the decision of the Justices may be termed their 'order,' "whether the same shall be a conviction or otherwise," which would imply a difference in fact between a conviction and an order. Besides, the 24 & 25 Vic., c. 100, s. 42, which enables Justices to punish assaults by fine or imprisonment, calls their adjudication a "conviction."—If this proceeding had been under that Act, the orders would have been bad. The meaning of the 14 & 15 Vic., c. 93, s. 37, is, not that for the future there shall be no distinction between orders and convictions, but that, if the language of a section deals with the act as an offence, the order shall be dealt with as a "conviction," and *vice versa*. If the word "order" always means "conviction," it must then apply to civil as well as to criminal adjudications. An order cannot be amended after it has been acted on. A conviction, however, may be made up at any time; so that the Court could now, if it thinks that these adjudications are "convictions," amend them, by striking out altogether the part which requires sureties to be given, and by expunging also one of the alternatives—payment of a fine, or imprisonment.—[O'BRIEN, J. Can you refer to any case in which a "conviction" has been amended after part of the sentence has been undergone?—HAYES, J.

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Your proposition amounts to this, that, although a "conviction" is indivisible, it may nevertheless be amended by striking out one-half of it.]—Columns 7 and 8 contain nothing about the alternative. —[O'BRIEN, J. But all the columns form *one* entire order, and the Justice signs the whole of it.]—The true meaning of the order is that, in default of payment of the fine, the party shall be dealt with according to law : that is an order good in form.

Harris, in reply, referred to the 14 & 15 *Vic.*, c. 93, s. 22, clause 5, as an additional proof that those adjudications were "convictions," but was stopped by the Court.

LEFROY, C. J.

I can add nothing to what has fallen from the different Members of the Court during the argument as to the necessity—because nothing but necessity overrules this Court to act in any way that operates with great hardship against Justices who are volunteers in the discharge of their duty; and it has often struck me as extraordinary that Justices who act as volunteers should be answerable in penalties for mistakes even of law, whereas the Judges of the land are not answerable in any case for their mistakes, or even for their blunders, if the mistakes amount to such. I have often thought that it was a grievous law. But I am glad to hear that at last the Legislature have taken that into their consideration; and, according to what we have just now heard from Mr. *Sidney*, by an Act of Parliament in England, which has either passed or is to be passed, the Justices will be delivered from the hardship of being answerable for every mistake of law into which they may chance to fall.

O'BRIEN, J.

I am also of opinion that the three convictions or orders in question should be quashed. The Summary Jurisdiction Act of 1851, c. 92, s. 9, clause 7, provides that any party committing the offence with which Donegan was charged, in each of these cases should "be liable to a fine not exceeding £10, or to be

imprisoned for a term not exceeding three months." This gives the Justices the power of inflicting *either* fine *or* imprisonment, *but not both*. And it is clear that the selection of either mode of punishment should be made by the Justices; that they should have decided whether fine or imprisonment should be inflicted, and should not have left the selection to the party charged, as has been done in these cases. In column 7, the several fines are awarded; and in columns 9 and 10, the term of three months' imprisonment with hard labour is awarded in each case, in default of payment of the fine; which clearly leaves the selection to the party charged. It has been suggested that the 22nd section of the Petty Sessions Act of 1851, c. 93, furnishes an answer to this objection, as that section provides that, where Justices are authorised to award a fine, they may also in certain cases award imprisonment, in default of payment of such fine. This provision does not, however, sustain any of the adjudications in question, because, by the second and third clauses of that section, it is requisite, before a party can be imprisoned for default in payment of the fine, that an order should previously be made for distraining the goods of the party for such fine; and the power of awarding imprisonment is given only in those cases where there shall have been such order for distress. There is no such order in any of the present cases; and the section relied on is therefore inapplicable. It is also to be observed, as to the first of these convictions, where the fine is only £5, that the terms of imprisonment authorised by said 22nd section of the Petty Sessions Act to be inflicted in default of payment of that fine is only two months, whereas that which has been awarded by the Justices is three months.

The principal ground however upon which Counsel have endeavoured to sustain these adjudications is, that they are to be considered as *orders*, and not as *convictions*, and that as, according to the general rules, the *orders* of Justices though bad in part may be enforced as to the good part, where the two parts are separable, we should, in the present instance, hold these adjudications good as to the award of fines, and strike out the parts which award

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imprisonment. In my opinion, however, these adjudications by which punishment has been awarded against a party for a criminal offence should, with reference to the question before us, be considered, not as *orders*, but as convictions which are indivisible. Counsel for the Justices have relied on the interpretation clause of the Petty Sessions Act, section 44, which provides that, "*in the interpretation of that Act,*" the word *order* shall include *conviction*. I have already referred, in the course of the argument, to the 37th section of that Act, and to the 21st section of the Summary Jurisdiction Act, as bearing upon the question, and am of opinion that, although from the several declarations, &c., contained in said Acts as to the meaning and extent of the word "*order*," any provisions contained therein as to "*orders*" made thereunder would also apply to "*convictions*" thereunder; and although, in proceedings under those Acts, "*a conviction*" may be termed "*an order*," yet that those declarations cannot be relied on as putting convictions under those Acts on the same footing for *all purposes* with orders properly so called, or as abolishing the well-established distinction, that although an *order*, which is bad in part and good in part, may be enforced as to the latter part, in case the two parts are separable, yet that a conviction is to be regarded as an entire judgment and indivisible, and that accordingly, if any material part of it be erroneous, such error vitiates the whole. This rule as to convictions has been recognised in several cases; and, in my opinion, it applies to the adjudications now before us.

It has been also urged, in support of these convictions, that the remedy by *certiorari* in respect of them is taken away by express enactment in the 24th section of the Summary Jurisdiction Act. But it has been repeatedly decided that, notwithstanding such an enactment, the remedy by *certiorari* exists as to proceedings in which the Magistrates have acted either without or in excess of jurisdiction; and, in my opinion, it exists also in the present case, in which it appears, from the convictions thereunder, that the Magistrates pronounced illegal sentences.

• With respect to the provisions of those two Acts, that orders or proceedings under them should not be quashed or vitiated for want of form, it is sufficient to see that the objections relied on in the present case are clearly as to matters of substance and not of mere form.

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May 2, 4, 5.

MANDAMUS.—John Rynd, the defendant, having been appointed by the Commissioners of Public Works in Ireland arbitrator between the Belfast, Holywood, and Bangor Railway Company and the persons interested in the lands required to be taken by the Company, refused to insert in his award the prosecutor's name, or to entertain, even by hearing evidence, his claim to be compensated by reason of his lands being injuriously affected and, as to a small portion, being required to be taken by the Company. The arbitrator, in his affidavit to show cause, stated that the grounds of his refusal were:—
“Because the land of said Andrew Cowan did not appear to be
“described on said maps or plans as part of the lands required to be
“taken by the Company, nor did his name appear in said schedules
“and estimates; and because Charles Lanyon, the engineer of the
“Company, stated distinctly, and which deponent believes to be
fused to deal with A's land, or to allot any compensation for consequential damage arising from the works of the Company.

Held, that though no part of A's land was taken for the purposes of the Company he was entitled to have his claim for compensation considered by the arbitrator.

Seemle—That A was entitled to compensation for the interruption of his right of access to the sea.

Seemle, per HAYES, J.—that with regard to the loss of A's light and prospect, the Company, being the grantees of the Crown, stood in a different position from that of the grantees of private individuals.

Mandamus.—
A was owner of land on the sea-shore, adjoining the land between high and low water mark. A R. Co. proposed constructing their line between A's land and the sea, and deposited plans, including a perch of A's land, but not naming him as owner; and they subsequently disclaimed all intention to take any portion of A's land. The arbitrator re-

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"true, that the Company did not intend to take or touch any portion of the ground of said Andrew Cowan; and deponent did not and does not consider any part of the lands of said Andrew Cowan to be injuriously affected by the works of the Company." The arbitrator further stated that he was guided by the maps, plans, schedules, and estimates, which the Company, in pursuance of the Acts in that behalf, had lodged with the Commissioners of Public Works in Ireland, who had handed them to him as arbitrator; and that they did not show that the railway would at all cross the fence between the prosecutor's land and the adjoining plot on its western side. The arbitrator also stated that he had by his final award provided, according to the best of his judgment, "ample accommodation works to enable *the inhabitants of the town of Holywood and the neighbourhood* to have full access to the sea for drawing coals from vessels stranded on the beach at low tide, as nearly as possible on the same line over the slob as has hitherto been used for that purpose, and also all reasonable and substantial accommodation for the public and for the said Andrew Cowan's beneficial enjoyment of said lands;" and that the works of the "railway will not darken any ancient or accustomed light on the lands of the" prosecutor; and that, as he believes, the works of the Company "opposite the prosecutor's lands will be constructed on lands acquired by the Company from the Crown, and will not touch any portion of" his lands.

The material facts relative to the *locus in quo* are these:—In the year 1852 the prosecutor bought for building-ground a plot close to the town of Holywood, which is a watering-place situate on the shore of Belfast Lough, at a distance of about four miles from the town of Belfast. No houses had as yet been built on the plot in question, though plans of five houses to be built thereon for the prosecutor, at an expense of £2500, had been prepared. The only building on the land was an old Presbyterian meeting-house, which has for some years past been used as a store. In the seaward face of that building are four windows. The view from the two windows in the lower storey is obstructed by a wall which surrounds the building; but the two windows in the

upper storey are high enough to overlook the proposed embankment. The plot of ground is bounded on the north (which faces the sea) by the battery wall which had been built to stay the encroachments of the sea. The battery wall is five feet in height, and ordinary tides rise on it to a height of nearly four feet at high water. When the tide ebbs, the waters of the lough recede from the front of the battery wall to a distance of seven hundred yards; and the soil thus left uncovered is a muddy slob. On the west, a fence divides the prosecutor's land from that of Mrs. Kennedy, on which stands a row of houses called Bath Terrace.

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Affidavits were filed on behalf of the prosecutor, by himself, his solicitor, and his engineer, in which were detailed at length the proceedings before the arbitrator. The prosecutor's allegation was that the parliamentary plans and the land plans of the Company showed that the embankment on which the railway is to run will enter in a slanting direction on his land on the west from Mrs. Kennedy's land, that its inner line of deviation will intersect the boundary fence some feet to the southward of the battery wall, which would itself be intersected thereby fifty-five feet to the eastward of Bath Terrace, whence the embankment would pass on to the slob, and so along the north front of his land. At this place the embankment is to be one hundred and ten feet wide at the base, and twenty-three feet high; and the triangle which it cut off from the prosecutor's land contained about one perch of hard arable ground. For this perch of ground he claimed compensation. As an accommodation work, he required the Company to build a bridge under the railway at a designated point opposite the end of Strand-street. The prosecutor further claimed compensation for valuable easements connected with his land, and which would be destroyed by the railway, because that he "and his predecessors in estate were in the habit of bringing coals and lime, or other cargoes, and did bring same over the strand up to said portion of land, and had the benefit both of a free and uninterrupted sea view from said portion of land to and across Belfast Lough, and also of a free access thereto and egress therefrom by boats" and other conveyances, and on foot. Another easement which would be destroyed was the right of

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bathing off the battery wall; and compensation was also claimed because the embankment would overlook the land so as to render it almost totally valueless for building purposes, for which alone it is valuable. Further compensation was claimed on the ground that the embankment would darken and would obstruct the approach of the ancient and accustomed light to his land.

On these affidavits, the Court, in H. T. 1863, granted a conditional order for a writ of *mandamus* commanding the arbitrator to inquire into and adjudicate upon the value of a certain piece or parcel of land situate in the parish of Holywood, barony of Lower Castlereagh, and county of Down, of the said Andrew Cowan, required for the purposes of said railway, and specified in the maps and plans deposited with the Commissioners of Public Works by said Company, and included within the limits of deviation appearing in said maps or plans, and upon the interest of said Andrew Cowan in said land, and to assess the purchase-money to be paid for said land; and also to inquire into and adjudicate upon and assess the compensation to be paid to the said Andrew Cowan by reason of any lands of the said Andrew Cowan being injuriously affected by the works of said Company; and to inquire and determine what works should be made and maintained by the said Company for the accommodation of the lands of the said Andrew Cowan adjoining the said railway, and duly to make his award in relation to the premises pursuant to the statute in that behalf: on the grounds that said claim is one which said arbitrator should inquire into and adjudicate upon under the statutes in such case made and provided.

The arbitrator, in addition to his own affidavit, the material passages from which have been set forth above, filed as cause affidavits by Mr. Lanyon, the Company's engineer-in-chief, under whose supervision, and of two of his assistants, by whom personally the parliamentary plans and the land plans had been prepared. The answer given to the allegations of the prosecutor, that one perch of his land, being included within the limits of deviation, would be taken by the Company, and that this fact appeared from these plans was a flat denial of both allegations; that the Company, therefore, had no power under their Act or otherwise to take or touch any portion

of his land; and that, even if they had such power, they did not now intend, nor ever had intended, to do so. As proofs that they never had intended to do so, they stated that the name of the prosecutor, whether as owner, lessee, or occupier of the land in question, or of any other portion of ground intended to be taken by the Company, did not appear in the schedules, estimates, or book of reference; that the boundary fence between his land and that of Mrs. Kennedy was not delineated on the land plans; though it would have been there delineated if the intention had been to enter a new property divided from Mrs. Kennedy's; and that in fact the inner line of deviation of the embankment, where it approached most closely to the prosecutor's land, would still be distant therefrom about five feet, which interval would gradually widen to sixteen feet while the embankment passed along the northern front of his land. It was further stated that the entire of that portion of the embankment which passed along the front of the battery wall would be constructed on the slob land which the Company had purchased from the Crown; that the old meeting-house was ninety-six feet distant from the centre of the line of railway; that the nearest and only roadway by which access to the shore could be had from the prosecutor's ground was opposite a part of the embankment at which the arbitrator had, in his final award, directed the Company to construct under the railway a bridge ten feet wide and fifteen feet high, to allow the inhabitants of Hollywood to have access to the sea for the purposes of bathing and drawing coal; that this bridge was in fact almost at the end of Strand-street, where the prosecutor, by his claim, required it to be made; and that this bridge and another at some distance, not opposite the end in question, were amply sufficient accommodation works for the beneficial enjoyment by the prosecutor of his land. In these affidavits the *locus in quo* was ascribed to a Miss Rowley.

Affidavits in reply were filed by the prosecutor and his solicitor, and by the agent of Mrs. Kennedy. From them it appeared that the proposed bridge at the foot of Strand-street would be no accommodation to the prosecutor's land, not being opposite thereto, and the only approach to it therefrom being over Mrs. Kennedy's

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A joint affidavit, filed by two engineers, stated that, even if the prosecutor had a right to construct a road which would form an approach from his land to the bridge, the expense of making and maintaining it would be very considerable. They also testified to the value of the easements, and stated that the perch of Mr. Cowan's land "is in fact, whether intended so or not, within the "limits of deviation delineated on the parliamentary plans; and "also that the same is a portion of the ground shown to be taken "by the Railway Company on and by their said land plans."

Brewster (with whom was *Dames*) showed cause.

The first branch of the case turns upon a dispute between the engineers, whose maps disagree. The Company say that they have no authority to take even an inch of the prosecutor's land.—[LEFROY, C. J. It is very early for him to make the application, before the works have been completed].—I do not blame him for doing so, because he must apply before the arbitrator makes his final award, which was signed on the very day on which the conditional order was granted. The Company also disavow, in positive terms, any intention to take a morsel of the prosecutor's land.—[O'BRIEN, J. If, in doing the work, they exceed their authority, this would not be the prosecutor's remedy; but he should bring his action of ejectment for the land taken.]—Just so: and the Company give cogent reasons to show that they never intended to take any part of his land, for his name is not mentioned as owner, lessee, or occupier in the plans, schedules, or book of reference.—[LEFROY, C. J. Are we to make a *quia timet* order, because the prosecutor apprehends that the Company will take a portion of his land?—He wants to insist that the Company is going to take his land, though it is sworn that five feet will intervene between the battery wall and the nearest part of the embankment. Besides, the Company has a right to abandon, if it pleases, the land, even if they had authority and had actually given notice of their intention to take it: *King v. The Wycombe*

Railway Company (a). The maps show that the embankment will not be constructed on any part of his land.—[LEFROY, C. J. I do not see how any map made by the Company can avail them here in the least. Is their omission to delineate the prosecutor's land on their map a proof that they will not take it?—On a motion for *mandamus* it is conclusive, for the prosecutor's remedy is by action of ejectment. An ejectment would be a much more efficacious remedy, as he would be able actually to take the land away from the Company, and thus stop the railway altogether. No *mandamus* can be sent to assess compensation for land which the Company do not intend to take.—[During the remainder of Mr. *Brewster's* argument, FITZGERALD, J. was absent.]—The last branch of the prosecutor's case relates to his claims on the Company for injuriously affecting his land by constructing the embankment immediately outside it. In cases such as this, in which no property is actually taken by the Company, a variety of questions of great importance arise; and it is difficult to determine whether the lands are injuriously affected within the meaning of the act. The prosecutor alleges that he has a right to compensation for injuries, of five classes:—First: the loss of light and air. Second: the loss of prospect which his houses, when built, would have. Third: that the premises will be overlooked by the railway. Fourth: the loss of access to the sea and the shore from his land for bathing and other purposes. Fifth: loss of access to his land from the sea and the shore for the purposes of bringing building materials, coals, &c., to his land, and for boating and other purposes. He makes no claim for compensation in respect to his facility of getting sea-weed, which would be no use to a plot of building ground. The proceeding to recover compensation is taken under the 8 & 9 Vic., c. 20, s. 6; the 8 & 9 Vic., c. 18, s. 68; and The Railways Act (Ireland), 1851 (14 & 15 Vic., c. 70, s. 9). Endeavours have been made to apply several tests to the words "injuriously affected." The strongest test as against the Company is, that no right to get compensation exists, unless it can be shown that the claimant would have been entitled to main-

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tain an action at common law, if the statute which protects the Company had not been passed. The statute takes away the right of action, because it empowers the Company to enter upon and take the lands on which the works are to be executed. Assuming, however, that there was no statute on the subject, how far could the prosecutor obtain, at common law, compensation for injuries which will be consequential on the erection of works which do not touch his lands, and, therefore, give no right to maintain an action of trespass? It is not contended that, in *no* case in which it happens that no part of his land is taken, is the party entitled to compensation; but that the injuries must be of that character which the law takes cognizance of, and must not be countervailed by the legal right of the party who does them in such a way that the injured party could not at common law maintain an action—his right being overborne by the superior right of the aggrieving party.

As to the first class of injuries, those which arise from the deprivation of light and air, it is a fixed principle of law that the only right, in this respect, which a man has, *as incident to his land*, is to the light and air in the space which intervenes from above, between him and the highest levels around; he has no right to lateral light and air. If a man has built a house, and the owner of the adjacent land has granted to him the light flowing from the side, the grantee has a right to it *under the grant*. He has also a right to that easement if the house has been built long enough to create evidence from which a grant of it will be presumed: *Martin v. Goble* (a): *Harbidge v. Warwick* (b); *Roberts v. Macord* (c). That last case shows that a man has not, *as incident to his land*, a right to lateral light; but that the owners of lands which are circumjacent, a raised piece of ground have, if there is no house upon it, a right to build, without opposition from the owner of the central plot, a wall or other erection all the way round, and to any height to which they can reach. The presumption that a right exists from grant to lateral light is not attached

(a) 1 Camp. 320.

(b) 3 Ex. Rep. 556-57.

(c) 1 Moo, & Rob. 232-33.

by the law to land, though it is attached to houses. On this last point there are early authorities of great weight: *Morris v. The Lessees of Lord Berkeley* (a); *Attorney-General v. Doughty* (b); *Fishmongers Company v. East India Company* (c). The last case shows that there is no common law right to this easement. The right must be founded either on agreement or use. "It is true," said Lord Hardwicke there, "the value of the plaintiff's house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man building on his own ground." Those cases afford an *a fortiori* argument, because no house exists on the prosecutor's land. That an erection diminishes the value of the neighbouring property is no test of the common law right: *Attorney-General v. Nicholl* (d); *Squire v. Campbell* (e); *Re Renny* (f), (observation by Lord Campbell, C. J.)—[O'BRIEN, J. In that case, I suppose that the railway was not constructed on the claimant's land.]—It did not touch the claimant's land, but abutted on it. Therefore, the loss of light, air, and prospect offers no ground for compensation, it is *damnum absque injuriâ*. Neither does the circumstance that the prosecutor's land will be overlooked by the railway: *Chandler v. Thompson* (g); *Re Renny* (h)—(Judgment of Crompton, J.) Again, loss of the right of bathing is no subject of an action at all; and, so far as concerns compensation under this Act, is open to another objection, that it is not a right incident to or connected with the land. The loss of the right of bathing is a mere personal injury, for which no compensation can be obtained under this Act. Besides, he suffers in this respect no injury peculiar to himself, but one in common with the public. Every subject who could lawfully get to the high-water mark would have a right, equal to the prosecutor's right, of bathing. The interposition of the embankment, between his land and the flow of the sea, is not such an injury as would give a right of action; for the Company obtained this

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(a) 2 Ves. sen. 452.

(b) 2 Ves. sen. 453.

(c) 1 Dickens's Rep. 163.

(d) 16 Ves. jun. 338.

(e) 1 Myl. & Cr. 459.

(f) 7 El. & Bl. 666.

(g) 3 Camp. 80.

(h) 7 El. & Bl. 671.

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slob land from the Crown, who held it as trustees for the public: *Hubert v. Groves* (a); *The King v. The Directors of the Bristol Dock Company* (b). The prosecutor has no right to shut out the rest of the public from the open sea. That right exists only in the owners of a dock, and under a special Act: *The King v. The London Dock Company* (c). The injury is not one of a private nature which affects the prosecutor beyond the public at large, so that an action would not lie: *Wilkes v. The Hungerford Market Company* (d). There is a case which seems to adopt a contrary principle — *The Queen v. The Eastern Counties Railway Company* (e); but the decision in that case went upon the special terms of the Company's Act. So, in *Glover v. The North Staffordshire Railway Company* (f) there was a private way injured. But it was conceded that no action would have lain if the way had been public, as the sea is. The present case falls within the rule laid down by Lord St. Leonards:—"It is a damage authorised by the Act of Parliament, and it is a general inconvenience which all the Queen's subjects are subjected to, and for which no particular remedy is pointed out:" *Caledonian Railway Company v. Ogilvy* (g). Counsel also cited *The New River Company appellants, Johnson respondent* (h); *Moore v. Great Southern and Western Railway Company* (i); and *Tuohey v. Great Southern and Western Railway Company* (k). In *Chamberlain v. West End of London and Crystal Palace Railway Company* (l), the judgment of Lefroy, C. J., in *Moore v. Great Southern and Western Railway Company* was approved of. A technical point remains: if the conditional order fails in part the prosecutor must fail altogether.—[O'BRIEN, J. I think that several cases have decided that the Court may mould the order.]

(a) 1 Esp. 148.

(b) 12 East 429.

(c) 5 Ad. & El. 163.

(d) 2 Bing. N. C. 293.

(e) 2 Q. B. 347.

(f) 16 Q. B. 912.

(g) 2 Macq. H. of L. Cas. 246.

(h) 6 Jur. N. S., 347; S. C., 29 Law Jour., N. S., Mag. Cas. 93.

(i) 10 Ir. Com. Law Rep. 46.

(k) 10 Ir. Com. Law Rep. 98.

(l) 2 Best & Sm. 605.

Harrison, in support of the conditional order, contended that, upon a careful inspection of the parliamentary plans, which were necessarily on a very minute scale, the perch of land in question would be seen to be represented thereon as portion of the ground the Company obtained powers to take, and that this appeared clearly by the land plans deposited with the Board of Works, which were on a larger scale, and included this perch, although the fence which separates it from the adjoining land is not shown on said plans, nor is it mentioned separately thereon. It is true the prosecutor's name is not mentioned in the parliamentary book of reference, nor in the schedules or estimates deposited with the Board of Works; but No. 9 on the land plans comprises this perch of land, along with other lands belonging to a different owner; and the Company, by including it in the land plans, are estopped from saying they did not require it.—[LEFROY, C. J. But may not the Company abandon what is in their plans?—A parcel abandonment is not sufficient to protect the owner of the land. They have no machinery by which they can now expunge this land from the plans. It might perhaps be a sufficient protection to the owner if the Court puts on its order a term that the Company shall *never* take the land; the prosecutor would then have a remedy against them if they ever attempted to take his land under their Act.—[LEFROY, C. J. Certainly, if the land is included in the parliamentary plans, the Company acquired a right to take it.]—The parliamentary plans and the land plans estop them from denying their right to take the land. By their own admission an interval of five feet only separates the nearest part of the embankment from the prosecutor's land. If the embankment settles down a little, or is affected by the force of the sea, so as to encroach upon the land, and the prosecutor then brings an action of trespass, he will be met by the valid objection that their Act gave them a right to take the land, and that as No. 9, which we have shown includes this piece of land, has been paid for, notwithstanding the prosecutor's name is not in the award or book of reference, still the Company have acquired a title thereto, although *now* they say they do not require it, and never intended to take it.

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The prosecutor must obtain compensation now or never; and his only means for obtaining that compensation is by the machinery provided by the Act, viz., through the intervention of the arbitrator. The insertion of his land on the plans caused him to incur expense in attending before the arbitrator; and the statement that the Company have no intention of taking his land is no answer to this application, so long as they have not taken any means to abandon their statutable right, either by getting the arbitrator to exclude this perch of ground from his award, or to insert a finding thereon that the Company abandoned all claim thereto.—[LEFROY, C. J. Can we *compel* the Company to take this piece of land?—They must *pay* for whatever they insert in their plans. This very perch of ground is included in No. 9 portion of the land shown on the land plans referred to in the final award; and compensation has been awarded by the arbitrator in respect of all the lands comprised therein; and Miss Rowley is returned in the schedule to such award as the owner of the whole of No. 9, including this perch; and compensation has been awarded to her in respect of such number.—[LEFROY, C. J. How do we know but that she may have a very good title to the land?—There is no evidence of it; and the prosecutor *produces his title-deeds to prove his title*. The matter will be concluded for ever if the Company once pay Miss Rowley.—[LEFROY, C. J. I know that in some case the claimant got an injunction from the Court of Chancery to prevent the arbitrator signing the final award. That course has not been taken in this case; and the prosecutor has allowed the final award to be signed without having got a *mandamus*.—His conditional order was granted before the final award was signed, though they bear date on the same day. Further, the accommodation work for the accommodation of prosecutor's adjoining lands is not sufficient: that accommodation work purports to be given, not with reference to the prosecutor's lands, but for the accommodation of parties drawing coals to the town of Holywood.—[HAYES, J. If the accommodation be not sufficient, should you not proceed by way of traverse? We are not a Court of Appeal from the arbitrator.]—It has never yet been decided whether the right to traverse exists

in such a case, where the name of the person *objecting to the accommodation works* provided is not upon the award.—[O'BRIEN, J. The words of the section giving the right to traverse are quite plain; but are not you now too late to go before a jury at all?]
At all events the prosecutor is entitled to carry his motion on this point also, because the arbitrator is bound to settle the accommodation works *with reference to* each person's land, which it is admitted he has not done in this instance, as he declined altogether to entertain the prosecutor's case. Lastly, the prosecutor's lands adjoining the railway are "injuriously affected," within the meaning of the 14 & 15 Vic., c. 70, s. 9, which is almost identical with the English Act (8 & 9 Vic., c. 18, s. 68). At first it was thought that no compensation was to be given unless some part of the claimant's land was actually taken; and some of the early cases under the Lands Clauses Act were decided on this principle: *The London and North Western Railway Co. v. Smith* (a). That principle, however, has been overruled: *The East and West India Docks and Birmingham Junction Railway Co. v. Gattke* (b); *The London and North Western Railway Co. v. Bradley* (c); *Regina v. The Eastern Counties Railway Co.* (d); *Caledonian Railway Co. v. Ogilvy* (e). And the tendency of all the recent decisions is to enlarge the beneficial meaning of the words "injuriously affected," and to give compensation wherever a fair legal claim has been proved: *Chamberlain v. West End of London and Crystal Palace Railway Co.* (f). Loss of light and air is a subject of compensation.—[HAYES, J. In this case another question may arise, whether persons who take lands from the Crown, which held them as a trustee for the public, must not take them subject to the liabilities of the Crown? The Crown never could have shut out the light, air and view: can a purchaser from the Crown have a right to do so?—LEFROY, C. J. Does not the Company's Act give them such a right?]
It gives them a right to construct the embankment, no doubt; but annexes to that right the liability

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(a) 1 Macn. & Gor. 216.

(b) 3 Macn. & Gor. 155.

(c) 3 Macn. & Gor. 336.

(d) 2 Q. B. 347.

(e) 2 Macq. H. of L. Cas. 252.

(f) 2 Best & Sm. 605.

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to pay for all injuries done by their works. Except under the authority of a statute, no building could ever have been erected on the slob land in front of the *locus in quo*, so that this case is circumstanced differently from all those which have been decided with regard to lateral light and air coming from adjoining land belonging to a private individual, and cannot be ruled by them. *Roberts v. Macord* (a) did not establish the general principle for which it was cited: *Gale on Easements*, last edition, p. 288. A man has no right to corrupt air on its passage to his neighbour's land: *Gale on Easements*, p. 290. Neither may this Company, without paying compensation, impede and render less salubrious the sea breezes coming to the prosecutor's land: *Broadbent v. The Imperial Gas Co.* (b); *The Imperial Gas Co. v. Broadbent* (c). That no houses have yet been built on the land is not an answer to the claim for compensation which must now be awarded for all losses, future as well as present.—[LEFROY, C. J. Could an action for loss of light and air be maintained unless the plaintiff showed that he had appropriated them?—Not in an ordinary case; but in such a case as this it is enough for the prosecutor to show that he might at some future time have appropriated them. In *Chamberlain v. West End of London and Crystal Palace Railway Co.*, compensation was given for the prospective loss which the owner of certain houses, which were only in process of erection, would probably sustain by a deviation in the highway near said houses, though at Common Law the houses must have been finished before the legal injury would have been complete. Again, the right to bathe in this particular place is peculiar to the prosecutor himself, and arises from his ownership of the land.—[LEFROY, C. J. In fact his private property gives him this accommodation, which no one else can enjoy except by his permission.]—It is in his individual capacity, as owner of this land, and not as one of the public, that he enjoys this easement: *Iveson v. Moore* (d); *Wilkes v. Hungerford Market Co.* (e); *Rose v. Groves* (f). The public

(a) 1 Moo. & Rob. 230.

(c) 7 H. of L. Cas. 600.

(e) 2 Bing. N. C. 293.

(b) 7 De Gex, M'N. & G. 436.

(d) 1 Lord Ray. 485.

(f) 5 M. & Gr. 613.

have no right to bathe between high and low water mark off a private manor: *Blundell v. Catterall* (a). On the remaining claim for damages for the loss of the right to use the sea as a highway, and for being debarred from all access thereto from the prosecutor's land, the prosecutor is clearly entitled to compensation; and the arbitrator had no right to refuse to hear his case on the ground that no portion of his land was taken by the Company. Whether or not the Company take any portion of his land, they are bound to compensate him for the loss of the valuable legal easements of which they will deprive him by the execution of their works. *Chamberlain v. The West End of London and Crystal Palace Railway Co.* is undistinguishable in principle from the present case. The case of *The King v. The Directors of the Bristol Dock Co.* (b), relied upon on the other side, is not analogous. The claimants there sustained no special damage more than any other of the King's subjects, and no peculiar legal right or privilege of theirs was infringed upon; nor had they even a prescriptive right to use the water for the pollution of which they claimed compensation. Here the prosecutor sustains legal special damage beyond other members of the public; and this has always been held sufficient to entitle him to compensation.

The case of *Moore v. The Great Southern and Western Railway Co.* (c) shows that the machinery of the Arbitrator's Court provided by the statute is the sole mode for the claimant, in every instance, to obtain compensation; and, when the arbitrator has refused to hear him, a *mandamus* to compel him so to do, and to adjudicate on his case, is his only mode of obtaining redress.

Dames, in reply, was arguing that, as the Company had no intention to take the land, or to include it in their plans, they could not be required to pay compensation, when a Member of the Court (FITZGERALD, J.) suggested that it might satisfy both parties if a disclaimer by the Company was entered on the order of the Court; and the parties agreed to adopt this course.

(a) 5 B. & Ald. 268.

(b) 12 East, 429.

(c) 10 Ir. Com. Law Rep. 46.

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As to the claims for the injuries affecting the prosecutor's lands. —[FITZGERALD, J. I am not now intimating any opinion on the point; but, supposing that the opinion of the Court should be, that the right of access to the sea, and the right to use it as a highway, are matters which would sustain an action at Common Law, and quite irrespective of the statute, will it be necessary for us in that event to offer any opinion upon the other classes of injuries alleged?]

—In order to prevent the matter coming back again to the Court, we would ask for an intimation of opinion on those points, as was done by Lord Campbell, in *Re Renny (a)*. —[O'BRIEN, J. We could not do that; for we must make our order in the terms of the Act. The matter will go before the Judge of Assize, who will then intimate his opinion, and, if necessary, reserve a case for the Court above. HAYES, J. Had Lord Campbell been sitting in Ireland, he probably would not have taken that course; but in England, the Sheriff had no assistance at all on points of law.]—Then other Courts cannot follow the decision in *Chamberlain v. West End of London and Crystal Palace Railway Co. (b)*; for it is opposed to the decision of the House of Lords in *Caledonian Railway Co. v. Ogilvy (c)*, and to the case of *The King v. The London Dock Co. (d)*; for the sea, as the Queen's highway for all her subjects, is very analogous to a road, inasmuch as the Railway Company cannot do any act below high-water mark without the assent of the Queen in writing, and signed by two of the Commissioners of Woods and Forests: 8 & 9 Vic., c. 20, s. 17. That is the protection which is given to the public to preserve their rights. If the Company do any such act without the requisite permission, the work so constructed may be abated as a nuisance. —[FITZGERALD, J. But we have now to deal with a private injury.]—But the Company is only interfering with a public highway, the sea. The prosecutor has no special privilege beyond the rest of the public, all of whom might have used the sea here just as much as he. There will intervene between his land and the embankment a space

(a) 7 El. & Bl. 668.

(b) 2 Best & Sm. 605.

(c) 2 Macq. H. of L. Cas. 229.

(d) 5 Ad. & El. 163.

into which the water will flow under the bridges, and along which carts can go as usual at low-water. In *Rose v. Groves* (a) it appears, from the judgment of Tindal, C. J., that there was an element which would have enabled the plaintiff, independently of any special and private right, to maintain an action. There is a case of *Iveson v. Moore* (b), which has been much relied on, in which Holt, C. J., was of opinion that the action would not lie.—[*Harrison*. But it appears at page 95 that that case afterwards went to the Court of Error, where all the Judges held that the action would lie.]—As to the loss of light and air, there is a very analogous case of *Webb v. Bird* (c), in which it was held that the owner of a windmill is not entitled to the lateral air coming to his mill: and *Jones v. Tapling* (d) shows with what strictness these rights must be limited.—[FITZGERALD, J. *Jones v. Tapling* has since been doubted, and has been brought to the House of Lords.]—It shows at all events that the right to light depends either on a grant or on the presumption of a grant. The Company will raise no objection below on the point that the time limited has elapsed.—[FITZGERALD, J. Consent cannot give jurisdiction.—HAYES, J. The arbitrator seems to have fallen into the cardinal error of thinking that, because no part of a man's land was actually taken, therefore he was to get no compensation.]

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LEFROY, C. J.

In this case we are all of opinion to make absolute the conditional order for a *mandamus*, which will be accompanied by an order which the parties will draw up, to their mutual satisfaction, in the way that was suggested originally by the Court, and to which the parties have acceded, with respect to a bar of any future claim by the Company affecting the prosecutor's title. We are of opinion to grant the *mandamus*, upon the ground generally that the lands of Mr. Cowan, the prosecutor, have been injuriously affected. We do not think it necessary to confine the right to make

May 5.

(a) 5 M. & Gr. 613.

(b) 1 Lord Ray. 486.

(c) 10 C. B., N. S. 268.

(d) 11 C. B., N. S. 283.

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a claim for compensation to cases in which the claimant's lands are actually taken, but that it belongs to the party in virtue of the injury to his own particular lands in any respect in which those lands have been injuriously affected. Several grounds have been stated here upon which the prosecutor insists that he is entitled to compensation, upon the ground of his lands having been injuriously affected. We do not think it necessary to select any of these, but rather leave them generally to be considered more solemnly and particularly, except as to the two instances in which it appears to us that the prosecutor's lands have been injuriously affected in respect to his own peculiar right of enjoyment of these lands. Any other grounds will be open to the prosecutor to insist upon before the arbitrator; and also, he may insist upon the question of what accommodation may be required, which will also be open for the arbitrator to decide upon. I believe that I have now shortly expressed the general view of the Court upon the case; and, if I have omitted any point which is of importance, my Brethren will supply it.

O'BRIEN, J.

I concur in the judgment of the Court, that the *mandamus* should be granted, for the purpose of directing the arbitrator to entertain and adjudicate upon Mr. Cowan's claims for compensation for damages for lands of his injuriously affected by the works of the Railway Company, and also his claim for accommodation works in respect of any of his lands adjoining the railway. The *mandamus* should be confined to those objects, as the Company state they do not require to take any of Mr. Cowan's lands, and are willing that an undertaking to that effect should be embodied in the order. The arbitrator has acted under a misconception in supposing that he should not entertain Mr. Cowan's claims for such compensation and accommodation works, because none of his lands were actually taken or required by the Company for the purposes of their railway. That was clearly an erroneous opinion of the arbitrator. It will be seen, by reference to the General Railway Acts of 1845, c. 18, s. 68, and c. 20, s. 6, and also to the Railways Act (Ireland)

1851, ss. 4, 8, 9, *et seq.*), that all parties whose lands are injuriously affected by the works of the Company, or whose lands adjoin the railway, are entitled to claim such compensation or accommodation works, and that the right to make such claim is not confined to those whose lands have been taken or required by the Company. It is not necessary at present to decide whether Mr. Cowan should be entitled to compensation or to accommodation works in respect of all the matters of which he complains. That would more properly be decided when the award shall have been made. I shall only say that at present it appears to me, upon the facts disclosed by the affidavits, that he is entitled either to compensation for damages, or to accommodation works in respect of the interruption by the railway works of his right of access to the sea and shore.

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HAYES, J.

I concur in the judgment pronounced by the LORD CHIEF JUSTICE, and also in the observations made by my Brother O'BRIEN. I apprehend, the discussion of this case will not be without its good effect, as the arbitrator will learn from it that, although a man's lands have not been actually taken by the Company, yet injuries may have been inflicted on him, for which he is entitled to compensation under the statute. As to the effect which is likely to result to the prosecutor from the construction of the embankment, which will prevent that access from his land to the sea which he has heretofore enjoyed, whether for the exercise of right of navigation, or for bathing, or any other lawful purpose for which the subject may require to have such access, I think he has been injuriously affected, and ought to be compensated. As to the obstruction of light, air, and prospect, that may be occasioned by the embankment, it is not necessary for us now to decide anything, and it may be as well to leave the consideration of it to a future opportunity and further inquiry.

It has been very lately* held, in the case of *Goodbody v. The Midland Railway Company*, reserved by my LORD CHIEF JUSTICE from the Home Circuit for the consideration of the Twelve Judges,

* 21st January 1863. See *Reserved Cases*, 1865, p. 20.

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that a person whose lands have been taken by a railway company is not entitled to compensation for depreciation in value by reason of a loss of prospect from his mansion-house, occasioned by an elevated embankment constructed on the lands so taken. This, and the several English cases in which it has been held that an action at law cannot be maintained for the disturbance of a prospect, all seem to go on this principle, that although the value of a mansion-house or other premises may be thereby deteriorated, yet the act complained of has been done by the defendant in the lawful exercise of his territorial rights as owner of the soil. But it may possibly be argued that a case like the present is essentially different. Here the Railway Company is the grantee of the Crown of the space between high and low water mark, which forms the proposed site of the railway. The Crown held that, not absolutely, as a private owner holds his land, but as a royal trustee, and subject to certain rights and easements on the part of the subject, such as the right of access to the sea for the purposes of navigation, fishing, and the like; and it may hereafter be matter for discussion, whether air and prospect are not to be reckoned among those rights, and whether a subject who has built a mansion fronting the sea, on the faith that he shall never be built out, is not afterwards to be compensated if he shall be so built out and the value of his property deteriorated by a Company purchasing from the Crown and acting under powers conferred by statute. On that matter it is not necessary for us, at present, to come to any conclusion, and I, therefore, must be taken as offering no opinion.

FITZGERALD, J.

I am scarcely called upon to express any opinion, as I was not present during the whole of the argument; but I desire to state the extent to which I concur in the judgment of the Court. The question as to compensation for the land itself is out of the case; and the Court leaves it to the Counsel to settle the shape of the disclaimer which is to be entered on our order for the protection of Mr. Harrison's client. The question remains, whether the prosecutor is entitled to compensation for injury to his lands, injuriously affected by the Company's works, though those lands have not

been taken by the Company or touched by the railway? I am of opinion that the prosecutor is, under such circumstances, entitled to compensation. Then, what constitutes consequential injury to his lands, by reason of the execution of the Company's works? For the purposes of the present motion, only, I am willing to adopt the test suggested by Mr. *Brewster*—namely, whether an action for that alleged injury would have lain at common law? I do not mean to express any opinion whatever whether or not that is the true test. But, adopting it for the present, it appears to me that in respect of the injuries which Mr. *Brewster* classed as numbers four and five—namely, what may be described shortly as cutting off the prosecutor's access to the sea from his land, for bathing and boating and other lawful purposes, and for preventing him using the sea as an highway, an action would have been sustainable at common law, not in respect of any public right, but for the interference by the Company with the prosecutor's peculiar and private right to get from his own land to the sea for those lawful and legitimate purposes. The prosecutor has, therefore, established a claim in respect to those alleged grievances, fit to be considered by the arbitrator. There are many injuries in respect to which no claim for compensation can be entertained; and I express no opinion whether compensation can be given for loss of light, air, or prospect; but the claim in respect of the lands being overlooked by the railway seems to be fanciful and unsustainable.

As it appears that the arbitrator declined to entertain the prosecutor's claim at all, it follows that the *mandamus* must also go to settle such accommodation works as the prosecutor is entitled to. No accommodation works have been settled in reference to the prosecutor's lands at all, and the accommodation works, if ample, may go to reduce almost to nothing his claim for compensation in other respects.*

*See as to compensation for cutting off water—*Regina v. Metropolitan Board of Works*, 3 B. & Sm. 710; compensation for damage foreseen—*Croft v. London and North Western Railway Co.*, 3 B. & Sm. 436. *Chamberlain v. West End of London and Crystal Palace Railway Co.* is discussed in *Ricket v. Metropolitan Railway Co.*, 10 Jur., N. S. 782. Compensation for right of sporting—*Bird v. Great Western Railway Co.*, 10 Jur., N. S. 782.

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REGINA v. LAURENCE KING.*

Aug. 18.

Venue.—Indictment contained the marginal venue “King’s Co.” No venue was stated in the body in the indictment. By 14 and 15 Vic., c. 100, s. 23, “the jurisdiction named in the margin was to be taken to be the venue for all the facts stated in the body of the indictment.” On the trial, it appeared that the offence was committed in the Co. of T., but within 500 yards of K.’s Co. The prisoner was convicted.—*Held* (dissentiente HAYES, J.), that the conviction was good.

THIS case was reserved by the LORD CHIEF JUSTICE of Ireland, and was as follows:—At the last Assizes for the King’s County, holden at Tullamore, Laurence King the younger, a prisoner, having been arraigned for the murder of James Henry Clutterbuck, a lieutenant in the 5th Fusiliers, pleaded not guilty to the indictment, which was as follows:—

“King’s County, to wit.	}	“The jurors for our Lady the Queen, “upon their oaths, present that Laurence King the younger, on the 8th of July in the year of our Lord 1865, feloniously, wilfully, and of his malice aforethought, did kill and murder James Henry Clutterbuck, against the peace of our Lady the Queen, her crown and dignity.”
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“True bill, for self and fellows. J. C. WESTENBA, foreman.”

“The said Laurence King the younger was tried for the said murder before me at an adjournment of the said Assizes, on the 4th day of August instant, and was convicted of the said murder, and was sentenced to be hanged on the 6th of September next.

“Upon his trial, it was proved that the murder of Lieutenant Clutterbuck was perpetrated by L. King the younger, by shooting him dead with his own double-barrelled gun, whilst they were both in a boat belonging to Laurence King, in the river Little Brosna, near Parsonstown, on the evening of the 8th of July last; in which river, close to where he was shot, his dead body was found on the morning of the 11th. It was proved that

* *Coram* LEFROY, C. J., MONAHAN, C. J., PIGOT, C. B., KEOGH, O'BRIEN, HAYES, JJ., FITZGERALD, B., FITZGERALD, J., DEASY, B., and O'HAGAN, J.

“Lieutenant Clutterbuck left Parsonstown barracks, in the King’s
 “County, about half-past four o’clock, p.m., on Saturday the 8th
 “day of July, with Laurence King as his attendant, on a shooting
 “excursion on and along the river Little Brosna; and in the course
 “of the said excursion they had gone on the said river Little
 “Brosna, which is navigable for boats, in King’s boat, and crossed
 “over to the Tipperary side from the King’s County side.

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“At the place where the murder was perpetrated, and for a considerable distance above and below it, the river Little Brosna was proved to be the boundary between the King’s County and the county of Tipperary, and at the place where the murder was perpetrated, the river was proved to be only 85 feet wide. The evidence showed that Laurence King the younger, when he fired the fatal shots, was at one end (the end nearest the King’s County) of his boat, proved to be thirteen feet nine inches long, which was at right angles with and up to the Tipperary bank of the river; and Lieutenant Clutterbuck was at the other end of the boat, next to the last mentioned bank; so that the murder was committed within a few feet of the boundary of the King’s County, far within the 500 yards limit mentioned in the statute of G. 4, c. 54, s. 26, and in the said boat during the said excursion.

“It was contended, on behalf of the prisoner, that the indictment was defective in not containing an averment that the murder was committed in the county of Tipperary, within 500 yards of the King’s County; or in case the Crown relied on the 27th section of the said statute, an averment of the special facts necessary to bring the case within such section; that therefore the prisoner should be acquitted. I considered the indictment sufficient, but reserved the point as to whether it was necessary that the indictment should contain the averments as contended for; and I respite execution until the decision of the Court of Criminal Appeal thereon was had, the convict remaining in prison under the said sentence.—THOMAS LEFROY.”

Leslie S. Montgomery (with him *Molloy*), for the prisoner.

The general rule of the law is, that the prisoner should be tried

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in the county in which the crime was committed. Formerly indictments contained not only the venue stated in the margin, but also a statement that the crime was committed at a particular place. By the 14 & 15 *Vic.*, c. 100, s. 23, it was enacted, that it should not be necessary to state any venue in the body of the indictment, but the venue in the margin was made sufficient. Taking the indictment as it stands, it would be an averment that the offence was committed in the King's County, and so there would be a variance in the evidence. Several statutes have varied the law as to the statement of the place. This case does not come within the 27th section of 9 *G.* 4, c. 54. As to the 26th section of that statute, the wording is:—"Every such felony or misdemeanor may be dealt with, enquired of, tried," &c. I ask particular attention to this section; though it enables an offence which is committed within 500 yards of another county to be dealt with in that county, it does not allow us to state that it was committed in that county. *R. v. Ruck* (a) interprets the words "dealt with," &c.—[Pigot, C. B. Does it appear in that case what were the words in the margin?—No; but I assume it was Hereford, where the case was tried. The words "dealt with" apply to proceedings before the Justice. *Rex. v. Brown* (b) is an authority directly in favour of the prisoner. As to the statutes, one class allows an offence committed in one county to be dealt with in another, but not to be charged as committed in a county in which it was not committed. Another class allowed this practice by express words. A distinction is intended between those two classes. All authorities hold that when this second class of the statutes does not apply, then an averment of the place is necessary. When the second applies, no such averment necessary: 26 *H.* 8, c. 6, s. 6, *Eng.*, and 38 *G.* 3, c. 52, s. 2, *Eng.*; 53 *G.* 3, c. 108, s. 24, relates to offences under the stamp laws, but to the same purport as 9 *G.* 4, c. 54; and the practice under these acts is in my favour. So the 11 *G.* 4 & 1 *W.* 4, c. 66, s. 25, the old statute dealing with forgery; 9 *G.* 4, c. 31, s. 22, deals with bigamy, and differs from the Forgery Act. Then comes

(a) *Russ. on Crimes*, p. 827, 3rd ed., 757, 4th ed.

(b) *Cr. & Dix.*, A. N. C. 46.

the 500 Yards Act (24 & 25 *Vic.*, c. 96, s. 64), and the Acts 24 and 25 *Vic.* cc. 96, 98 and 99. In *Regina v. Innes* (a), the indictment was under the old Forgery Act. That Act allowed "the offence to be laid and charged." The venue is not given in that case; but we must assume it where the Court was sitting. In *Regina v. Smythies* (b) the question was, whether the prisoner could be considered to be proved to be in custody at the time of the indictment, when the proof only related to his being in custody at the time of the trial. Mr. Baron Parke there says that the case of *Rex v. Whiley* (c) was incorrectly reported; but he was referring to another decision on the same case. *Rex v. Whiley* is an authority. In *Rex v. Frazer* (d) the offence was committed in Surrey, but the prisoner was apprehended in Middlesex. The report is very meagre, but in my favour. The statute there was 9 *G.* 4, c. 31, s. 22. *Rex v. Whiley* is reported in 2 *M. C. C.*, and 1 *Car. & Kir.* 150. The note of the editor, in *Regina v. Smythies*, shows that Mr. Baron Parke was wrong. The case in *Car. & Kir.* was with reference to the caption of the indictment. *Whiley's case* is an authority for me; for it was held that there was nothing in the caption to show that the prisoner was in custody at the time, without any averment in the indictment.—[MONAHAN, C. J. There, the indictment shows on the face of it that the offence was committed elsewhere; so the indictment was bad on the face of it. Here you say it appeared by the evidence.]—The principle of their first decision is, that there should be something to show jurisdiction in the Court. The caption could show nothing in the present case to give jurisdiction.—[MONAHAN, C. J. Is not the object of the Act this, that, where the pleader is doubtful about the bounds of a county, there may be no difficulty about the evidence?—If in doubt on that account, why not put in two counts, one for Tipperary, another for the King's County?—[O'BRIEN, J. Then if the jury agreed that the murder was committed, but one party thought that it was committed in one county

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(a) 7 *Car. & P.* 553.(b) 1 *Den. C. C.* 498.(c) 2 *Moo. C. C.* 186; *S. C.*, *C. & Kir.* 154.(d) 1 *Moo. C. C.* 407.

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and the other in another, there would be no verdict, though they might all agree that it was committed within 500 yards of either boundary?—*Rex v. Miller (a)*; *Rex v. Goff (b)*. These show what the practice was, where an offence committed in the county of a town was tried in the adjoining county; the facts were laid as they stood.—[KEOGH, J. In *Goff's* case where was the averment to bring jurisdiction back again?—When an offence is committed in a county of a city, and tried in the adjoining county, the Court takes judicial cognizance of the adjoining county: *Rex v. Scully (c)*. *Regina v. Mitchell (d)* contains some arguments apparently against me; but the decision was in my favour. The indictment there was framed under the 5 & 6 W. 4, c. 76, s. 133, which was subsequent to the 500 Yards Act.—[FITZGERALD, J. That case is chiefly valuable for the interpretation of the 7 G. 4, c. 64, by the Judges.]—*Regina v. Windham (e)*, *Regina v. Loader (f)*, and *Noon's case (g)*, show what the practice in pleading in such cases was. The Legislature itself contemplated that there should be such an averment, and have laid down what that averment is to be. Offences committed on the seas is another instance in my favour. There the averment is, that the offence was committed on the high seas within, for instance, the jurisdiction of the Central Criminal Court. As to the 27th section of 9 G. 4, c. 64, there is no averment here that the shooting excursion was on the river; it was “on and along the river.” It is a straining of terms to say that it was committed during the journey.—[PIGOT, C. B. Supposing we agree with you, what will be the result?—This Court has only power to affirm or to amend.—[MONAHAN, C. J. Your objection would come under the words of the Act constituting this Court, “that he ought not to have been convicted:” 11 & 12 Vic., c. 78, s. 2.]—We are now considering what the Judge should have

(a) Russ. & Ry. 144.

(b) R. & R. 179.

(c) Alc. & Nap. 262.

(d) 2 Q. B. 636.

(e) Russ. & Ry. 197.

(f) 2 Russ. on Crimes, p. 122.

(g) Ir. Cir. Cas. 110.

done; had he ruled the point in our favour, he could have done nothing but direct a verdict of acquittal.—[MONAHAN, C. J. The question would arise, in case of another indictment against the prisoner, whether he could plead this verdict?]

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The object of the Act 9 G. 4, c. 54, was to prevent the pleader being embarrassed where he was uncertain in what county the offence had been committed. The effect of this argument is, that we must make up our mind where the offence had been committed, before framing the indictment. The pleader must say, the offence was committed in this county, but I do not choose to lay it there.—[DEASY, B. Suppose the murder committed in a railway train crossing the boundary of two counties.]—Exactly.—[PIGOT, C. B. But it would be consistent with your argument that you should lay it as committed within 500 yards of either side, or within 1000 yards space.]—Then if it appeared to be committed wholly within the Queen's County: *Regina v. Sharpe (a)*. "Dealing with" applies to every part, and cannot be confined to the proceedings before the Justices. Lord Denman says the operation of this Act was merely to extend the county 500 yards. Patteson, J., says the pleader may lay it in either county. *Regina v. Mitchell (b)*—the venue may be laid in either county. When *Rex v. Brown* was decided by Chief Baron Joy the law was different as to the venue; 14 & 15 Vic., c. 100, is the present Act.—[O'BRIEN, J. If the Counsel for the prisoner were right, there would be a contradiction between the body of the indictment and the statutable interpretation of the venue in the margin.]—In *Regina v. James (c)* it appeared that the marginal venue did not apply. The caption is no part of the indictment; though what is said in the case of *Rex v. Whiley* shows that if the venue appears in any way it will be sufficient. *Rex v. Whiley* overruled *Rex v. Frazer (d)*.

(a) 1 D. C. C. 415.

(b) 2 Q. B. 636.

(c) 7 C. & P. 553.

(d) 1 M. C. C. 407.

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This offence is to be dealt with "in the same manner" as if committed wholly within the county; if committed wholly within the county, then there would be no averment—nothing but the venue in the margin. Much light is thrown upon this statute by the recent statutes, as to the punishment of accessories, 11 & 12 Vic., c. 46: *Regina v. Hughes (a)*. As to the case cited from *Cr. and Dix's Ab., N. C. C.*, that is a book in which we can find any proposition that ever was contended for. All the cases cited depend upon statutes where the words were less strong than in the present one. *The King v. James* is an authority of weight; it decides two propositions; first, that you may lay the offence where it was not committed; secondly, that the evidence of the offence is applicable to that indictment.—[PIGOT, C. B. There the word "indict" occurred.]—Yes; but you have here "*deal with*." As to *Rex v. Whiley*, the report is censured by Mr. Baron Parke; the indictment was held bad, because it was out of the jurisdiction. In 2 *Russ.*, p. 122, "tried" is held to include the finding by the grand jury: *Regina v. Smythies* is express authority that an indictment under the Act gave jurisdiction.

Molloy, in reply.

The venue is always matter of substance: 1 *Chit. Cr. Law*, p. 189 a; 194 and 176. All facts within the realm should be laid in the county in which they actually happen.—[O'BRIEN, J. In the case of bigamy, what is alleged except that both the wives were alive?—Well, then, if it turned out to be in a different county from where it was tried it would be a variance that might be amended at the trial under Lord Campbell's Act.—[MONAHAN, C. J. That is by a new averment.]—24 & 25 Vic., c. 100, s. 57; 1 *D. C. C.*, p. 498; *Regina v. Smith (b)* shows that an averment may be made under Lord Campbell's Act. If the words "dealt with" mean what the *Solicitor-General* states, then "tried," &c., are superfluous: 1 *Russ. Cr.*, p. 827, gives the meaning of these words.—[KEOGH, J. "Dealt with" is a rather vague expression for

(a) Bell's C. C. 242.

(b) 1 F. & F. 36.

the proceeding before a Justice; the phrase "determined" is in that case applied to a Judge; but a Judge does not determine these matters.]—*Rex v. Jones (a)*.

Cur. adv. vult.

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HAYES, J.

The difficulty in the present case arises on the true construction of the statute, 9 *G.* 4, c. 54, ss. 26 & 27. The venue in the margin of the indictment before us is the King's county; thus indicating that the indictment has been found by a grand jury of that county, sworn to inquire and true presentment make of matters arising within it, or which shall otherwise be lawfully given in charge to it. Reading the indictment by the instructions given to us by the recent Act of the 14 & 15 *Vic.*, c. 100, s. 23, we must take it also as virtually averring and charging that the offence set forth in the indictment so found was committed within the King's County, and within the jurisdiction of the grand jury of that county; for, in the language of the Act,—“The jurisdiction named in the margin is to be “taken to be the venue for all the facts stated in the body of the “indictment;” yet, with some inconsistency and repugnancy, it has been set forth on the case, that the offence was committed in the county of Tipperary; and, as by the common law every offence ought to be prosecuted in the county in which it has been committed, it would seem to follow, at once, that a King's County grand jury had no authority to inquire of a Tipperary offence. No doubt this is so; but then it is alleged that this infirmity and defect of the common law has been aided by the statute of 9 *G.* 4, to which I have referred.

That statute, in both its sections, professes to have been made for the more effectual prosecution of offences committed under certain circumstances there partially set forth, and it gives such relief as the Legislature has thought fit to administer in those cases. Beyond that, it is not for this Court to go, unless we would assume to ourselves the character of a legislative rather than a judicial tribunal.

Before this statute, and that for which it was substituted, were

(a) 1 D. C. C. 551.

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passed, upon the trial of an indictment so framed, as soon as it was shown to the satisfaction of the Court that the offence laid and charged to have been committed in the King's County had in fact been committed in the county of Tipperary, the functions and powers of the Court of Oyer and Terminer in the King's County would have thereupon been ousted, and the prisoner on trial would have been entitled to an acquittal. What is there then in the statute which authorises and enables us to uphold a conviction by that tribunal on similar evidence?

The 26th section enacts, that in the three cases there put, viz.—first, of a crime committed on the boundary of two or more counties; or, secondly, within the distance of 500 yards of such boundary; or, thirdly, of a crime begun in one county and completed in another;—in any of these three cases an enlarged jurisdiction is given, not only to the grand jury as to finding the bill of indictment, but also to the Court as to trying and determining and punishing the offence. In the language of the statute, “Every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein.”

The 27th section, having the same object in view, viz.—the more effectual prosecution of offences, provides for another set of circumstances, viz.—first, for crimes committed on any person, or on any property, upon any carriage when engaged in a journey, or on board any vessel employed in any voyage upon any navigable river, canal, or inland navigation; or, secondly, where a part of any highway or of any such river, canal, or navigation shall constitute the boundary of any two counties. In any of such cases, as the statute, in very similar language, informs us, the offence “may be dealt with, inquired of, tried, determined, and punished in either of such counties, through, or adjoining to, or by the boundary of any part whereof such carriage or vessel shall have passed in the course of the journey or voyage during which the crime shall have been committed, in the same manner as if it had been actually committed in such county.”

In the cases that I have mentioned, and in them only, does the statute profess to give relief. And it appears to me to be no great or difficult burden imposed on a prosecutor, to call on him to state on the face of the record which he brings down for trial whether he seeks statutory relief in any and in which of these cases. And if he is ignorant of the exact nature of the evidence to be given, I see no difficulty, as in similar cases of uncertainty, in his laying the offence in different ways in different counts of the indictment, as he thinks will best make the record to correspond with the proofs to be presented to the jury on the part of the prosecution; but unless he has special authority for so doing, I see nothing to exempt the prosecutor from the necessity under which he previously lay, of averring, as well as proving, that the case was so circumstanced as to come within the legal cognizance of the grand jury to which the bill of indictment is to be submitted. No part of the statute—none of the language used in it—seems to interfere with the course of pleading, but is altogether conversant with giving an enlarged jurisdiction and authority in certain cases; and which cases, when they arise, may, as the statute says, “be dealt with, inquired of, tried, determined, and punished,” as there mentioned or referred to. It has been said at the Bar, that the words “dealt with,” without any of the other phrases used, are of such general import as to render any change or additional averment in the pleading wholly unnecessary: in short, that two indictments in the very same form, save the venue in the margin, and without any reference to the statute or to the circumstances relied on as requiring the statutory relief, may be presented to each of the grand juries in the two counties referred to in the case. But is this a correct or proper mode of dealing with the grand jury or of construing the statute; and would it not be better that if the statutory aid is required, there should be introduced a short and general statement of the cases under which it is so required, so that it may appear upon the record that this is a case in which the grand jury is armed by the statute with an enlarged authority to deal with and present the case, though not within the limits of their common law authority? In the absence of such statement, how

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could the grand jury be blamed if they insisted on confining themselves within their common law authority, and while sitting in the King's County they refused to present a bill of malice done in the county of Tipperary; unless by some statement on the face of the bill of indictment laid before them, they should be made aware of the enlarged powers conferred on them by statute, and which it was then their duty to exercise? In my opinion, the phrases employed, "dealt with, inquired of, tried, determined, and punished," have regard to matters of procedure and judicature, but leave wholly untouched the question of pleading. The language used is not as in other statutes [see 11 *G.* 4 and 1 *W.* 4, c. 66, s. 24], where the expressions employed are "indicted," "laid," "charged," or the like; by which the form of pleading proper for an offence under one state of circumstances is plainly meant to be made applicable to the same offence under another state of circumstances.

The practice decisions upon the law as to bigamy afford us, in my opinion, very useful instruction. Thus, so far back as the 1 *Jac.* 1, c. 11 (*Eng.*), it was placed nearly on the same footing as it stands at present. That Act recites the practice of persons being married running from one county into another, where they are not known, and there being married a second time, having a husband or wife living. It then enacts that every such offence shall be felony, "And the party so offending shall receive such and the like proceeding, trial, and execution in such county where such person or persons shall be apprehended, as if the offence had been committed in such county where such person shall be taken or apprehended." Since that time, it has been held that where a person having committed the crime of bigamy in one county is apprehended and made amenable for the offence in another county, and thus the benefit of the statute called in aid—as it was not competent at the common law for the grand jury of either of the counties to take full cognizance of the offence—that benefit is derived by introducing into the indictment an averment that the prisoner was, at the time of finding the bill, in custody in the county of the finding, and which circumstance gave the grand

jury authority to interfere in the matter: *Regina v. Whiley* (a); *Regina v. Frazer* (b). So here, if the indictment had set forth and contained an averment that the case fell within one of those states of circumstances referred to in, and contemplated by, the statute, as intended to be relieved thereby, the enlarged authority of the grand jury would be made apparent on the face of the record. But, in the absence of such averment, it appears to me that no authority is shown on the face of the record for a grand jury of the King's County to take cognizance of an offence committed in another county, and beyond its local jurisdiction. Thus, if it had been averred in this indictment that the offence had been committed in another county, and within the distance of 500 yards of the boundary between that and the county in which the indictment is preferred, it would have been plainly competent for the prosecutor to have availed himself of the benefit of the statute, by preferring his indictment to either or to both of the counties; but without such averment he is, I apprehend, only authorised to present his bill to the grand jury of the county in which the offence shall be thereby charged, and in which he is prepared to prove it to have been committed. Thus, in *Regina v. Mitchell* (c), an indictment was found by a Quarter Sessions grand jury of the borough of Stamford. It alleged the offence to have been committed in that part of the borough which is in the county of Northampton; but being removed by *certiorari* it was sent for trial before a jury of the county of Lincoln, in which the rest of the borough was situated. The place where the offence was committed was within 500 yards of the county of Lincoln; but the indictment contained no averment to that effect. It was held that the trial in Lincolnshire was without jurisdiction, and the judgment was arrested.

In the present case, inasmuch as it has not been shown on the face of the record that any facts exist in the case which give to a grand jury of the King's County any power or authority to present an offence committed in the county of Tipperary, I am of opinion

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(a) 2 Moo. C. C. 186.

(b) 1 Moo. C. C. 407.

(c) 2 Q. B. 636.

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PIGOT, C. B.

The prisoner in this case was convicted of wilful murder, before my LORD CHIEF JUSTICE, at the adjourned sitting of the last Assizes for the King's County. The indictment contained the usual marginal venue, "King's County to wit;" and it alleged the murder to have been committed on a day specified, without any statement of the place at which the act was done. It appeared in evidence that the prisoner perpetrated the murder by shooting the deceased while they were both in a boat, upon a river which, at the place where the transaction occurred, and for a considerable distance above and below it, was the boundary between the King's County and the county of Tipperary; the river being there not more than eighty-five feet wide. The boat, at the time of the transaction, was at the Tipperary side of the river. The crime was therefore committed far within the space of 500 yards from the boundary of the two counties,—the limit prescribed by the statute 9 *Geo.* 4, c. 54, s. 26.

It was contended, on behalf of the prisoner, that the indictment was defective, in not containing an averment that the murder was committed in the county of Tipperary, within 500 yards of the King's County, or (in case the Crown relied on the 27th section of the statute) an averment of the special facts necessary to bring the case within that section; and that therefore the prisoner should be acquitted. The case of *Regina v. Brown*, tried before Lord Chief Baron Joy, reported in *Crawford & Dix's Abridged Notes of Cases*, p. 46, was relied on in support of this objection.

My LORD CHIEF JUSTICE considered that the indictment was sufficient; and the prisoner was accordingly convicted and sentenced. But, in deference to the authority of the eminent Judge by whom the case of *Regina v. Brown* was decided, he reserved the point for the consideration and decision of this Court; respiting the execution of the sentence until that decision should be obtained.

The case has been now argued before us. With the exception

of my Brother HAYES, we are all of opinion that the ruling of my LORD CHIEF JUSTICE was right, and that the objection is not sustainable.

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It must, I think, be admitted that the decision of the late Lord Chief Baron Joy, in the case of *Regina v. Brown*, is a direct authority in favour of the objection. It was suggested, in the course of the argument on the part of the Crown, that the report may have been inaccurate. There is no ground whatever for so supposing. My Brother FITZGERALD has found, on a search in his Court (the Court of Queen's Bench), the file of proceedings which, as truly stated in the report, were returned into that Court by *certiorari*. It appears that Brown, and a number of other persons, were indicted for having joined in a procession, in violation of the Party Processions Act; and the offence was laid, in the indictment, as having been committed at Ballyhoe in the county of Monaghan. From one, at least, of the informations, the alleged transaction would appear to have taken place near the boundary of the counties of Monaghan and Fermanagh. There can be no reasonable ground for doubt that the case was reported by a member of the Bar, and that Lord Chief Baron Joy did, in fact, rule, as stated in *Crawford and Dix (a)*, that "The indictment cannot be sustained under the 9th Geo. 4, c. 54, s. 26," and that "In an indictment under that Act, the offence should be stated to have been committed in "the county of Fermanagh, within 500 yards of the county of "Monaghan." Accordingly, the parties charged in that case were acquitted.

It has been suggested, that the decision in *Regina v. Brown* has no application to an indictment framed under the 14 & 15 Vic., c. 100, s. 12, which renders it unnecessary to state any place, as a venue, in the body of the indictment. But the application of the decision cannot be avoided in that way. For the 12th section of the 14 & 15 Vic., c. 100, expressly provides, that "the venue in "the margin shall be the venue for all the facts stated in the body "of the indictment." Every fact alleged must, therefore, be treated as being alleged to have occurred within the county named in the

(a) A. N. C. 47.

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margin. And this was, in effect, precisely what was done in every indictment framed in the old form; for although a particular vill, or place, was laid in connection with each material allegation, it was sufficient to prove that the fact alleged occurred in any place within the county.

The view which Lord Chief Baron Joy took of the statute in 1837, when the case of *Regina v. Brown* was before him, was the same as that which appears to have influenced the framing of the indictment in *Rex v. Ruck*; of which a note, from a manuscript report, is given by Mr. *Greaves* in the third edition of *Russell on Crimes and Misdemeanours*, vol. 1, p. 827, cited in the argument before us. There, the indictment, upon which the case was tried before Baron Parke at the Hereford Spring Assizes in 1829, laid the offence (which was burglary) as having been committed "at the parish of English Becknell in the county of Gloucester, within 500 yards of the county of Hereford." The crime of burglary, however, has been treated as an offence local in its nature; and it has been necessary to show, that the dwelling-house at which it was committed was situate at some place within the jurisdiction of the Court. The precedent, therefore, such as it is, which is afforded by the case of *Rex v. Ruck*, cannot affect the decision of the question now before us. Neither is it likely that in the case of an offence of a local character, such as burglary is (the scene of which, a dwelling-house, must be known, and be capable of being easily proved by the prosecutor, whether it be or be not near an ill defined boundary of two counties), any practical inconvenience can arise from stating the place at which the outrage was perpetrated.

No other authority has been cited, or, I believe, can be found, directly applying to the Act of Parliament upon which we are now called on to decide. The decision in the case of *Regina v. Brown* cannot be lightly and summarily dealt with. It was the ruling of a Judge of high authority; who was one of the most eminent lawyers of his time; who had been, as Attorney-General, for several years public prosecutor, and who had the experience of several years upon the Bench. It is a decision which has remained unreversed and

unquestioned since the year 1837, when it was made, to the present time. As such we must deal with it. And, we have now, sitting in a Court of Appellate Jurisdiction, deliberately to consider and determine whether the rule there applied is, or is not, to prevail; that is, whether, where proof is given that the offence charged was perpetrated within 500 yards of the county of the venue, such proof will sustain an indictment framed in the general form allowed by the 14 & 15 Vic., c. 100, s. 23, and containing no statement showing that the offence was committed within those limits.

This question must be determined by the terms of the enactment, expounded by what is its purpose, as shown by the Act of Parliament itself, and, if need be, by the aid which can be derived from the language of the Legislature applied in provisions made in *pari materia*.

The 26th section of the 9 G. 4, c. 54, is in terms the same as the 12th section of the 7 G. 4, c. 64, English. The 27th section of the Irish, and the 13th section of the English statute, provide for offences, as well misdemeanors as felonies, committed upon any person, or in respect of any property, in a carriage or vessel, in the course of a journey, or voyage upon a navigable river, canal or inland navigation. A previous imperial statute, 59 G. 3, c. 96, had been passed for similar objects to those of the 12th & 13th sections of the 7 G. 4, c. 64, and the 26th & 27th sections of the 9 G. 4, c. 54; but with a more limited range. It was confined to felonies. It contained only two sections. The first made provision for prosecutions in the case of felonies (but not of misdemeanors) committed on carriages (but not on vessels) conveying goods during their journeys. The second provided for prosecutions in the case of felonies (but not of misdemeanors) committed within 500 yards of the boundaries of counties.

The second section of the 59 G. 3, c. 96, was in these words:—
 “And whereas felonies are sometimes committed on or so close to
 “the boundaries of two or more counties, that the offenders escape
 “unpunished, from the defect of proof that the felony with which
 “they are charged was committed within the county in which such
 “offenders may be indicted; be it therefore enacted, that from and

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"after the passing of this Act, in any indictment for any felony committed on the boundary or boundaries of two or more counties, or within the distance of 500 yards of any such boundary or boundaries, *it shall be sufficient to allege* that such felony was committed in either or any of the said counties; and every such felony shall and may be *enquired of, tried, and determined* in the county within which the same felony shall be *so alleged to have been committed*; and all and every person and persons who shall be convicted of any such felony so to be enquired of, tried, and determined as aforesaid shall be subject and liable to all such pains of death, and other pains, penalties, and forfeitures, as such person or persons so convicted of such felony would have been subject and liable to, in case such felony had been enquired of, tried, and determined in the county in which the same felony was actually committed; any law, statute, or usage to the contrary notwithstanding."

This enactment provides, expressly, that "*it shall be sufficient to allege* that such felony was committed in either or any of the said counties." And it then proceeds to enact, that "every such felony shall and may be *enquired of, tried, and determined*, within the county within which the same felony shall be *so alleged to have been committed*." The first section of the same statute, 59 G. 3, c. 96, contains similar provisions in reference to felonies committed on stage coaches, or other carriages for the conveying of goods; enacting, that it shall be sufficient to allege, in the indictment, that the felony was committed within any county or city through any part whereof such stage coach, or other carriage, shall have passed in the course of the journey during which such felony shall have been committed.

The 59 G. 3, c. 96, was repealed, as to England, by the 7 G. 4, c. 64; as to Ireland, it was repealed by the 9 G. 4, c. 54, which provided that the repeal should take effect from the 31st of August 1828. The next statute of the same session was the 9 G. 4, c. 54, which came into operation on the following day, the 1st of September 1828. The 26th section of that statute (9 G. 4, c. 54), on which the present question arises, is in these words:—"And for the

“more effectual prosecution of offences near the boundaries of counties, or partly in one county and partly in another, be it enacted, that, where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanour shall be dealt with, inquired of, tried, determined, and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein.” No doubt can reasonably be entertained that the purpose of the repealed section (2) of the 59 G. 3, c. 96, and the purpose of the substituted section (26) of the 9 G. 4, c. 54, were one and the same. The latter statute contains a variety of provisions to effect the object, professed in its recital, of improving the administration of justice in criminal cases in Ireland, as the 7 G. 4 was passed to accomplish a similar purpose in England. It uses phraseology less expanded and more condensed than that of the repealed statute, which contained only two sections; but when, in the prefatory words of the 26th section, the Legislature declares its purpose to be, “for the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another,” it is manifest that it must have contemplated that impediment to the effectual prosecution of such offences, which the Legislature itself, in the preamble to the repealed section for which the new provision was substituted, had described by stating, that “Felonies are sometimes committed on, or so close to, the boundaries of two or more counties, that the offenders escape unpunished, from the defect of proof that the felony with which they are charged was actually committed within the county in which such offender may be indicted.” If we expound the substituted section, by reference to the expressed purpose of that which was repealed, and with which it is *in pari materia*, we ought to give it such an operation, consistent with its words, as shall best advance the purpose of that provision, the place of which it fills in this line of legislation. The terms of the 26th section itself seem to point

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to this result. The second section of the 59 G. 3, c. 96, provides, that "in any indictment," &c., "*it shall be sufficient to allege that the felony was committed in either or any of the said counties.*" And it then enacts that "every such felony shall be inquired of, tried, and determined" in the county within which it is alleged to have been committed. In the 26th section of the 9 G. 4, c. 54, no such words appear as those which describe what it shall be sufficient to allege; but it contains words which (notwithstanding the verbal criticisms stated to have been applied in the report of *Regina v. Ruck* (a) appear amply sufficient to embrace every part of the procedure, "may be dealt with, inquired of, tried, determined and punished" in any of the said counties. The terms "dealt with" must, in their fair and ordinary meaning, include at least all that was necessary for so "dealing with" the case as to ripen it for being "inquired of, tried, determined and punished." It cannot be "tried, determined or punished" without an indictment. If that be so, it may, at the stage of preferring the indictment, as well as at all the subsequent stages, be dealt with "in any of the said counties in the same manner as if it had been actually and wholly committed therein." And if that be so, it must follow that the case may be treated, in pleading as well as in proof, as if the offence had been committed, not within 500 yards beyond the boundary line, but within the precincts of the venue county. The framers of the 9 G. 4, c. 54, s. 26, appear, for the purpose of avoiding a multitude of words, to have dropped the phrase which they had used in the early part of the second section of the 59 G. 3, c. 96, and by which they had described what may be alleged in the indictment, and the still longer phrase at its close, describing the liability to punishment, and to have substituted the short phrase "dealt with" for the first, and the single word "punished" for the second.

A little further examination of the 26th section of the 9 G. 4, c. 54, will make its true import still more apparent. It provides not only for offences committed near the boundaries of counties, but also for offences committed partly in one county and partly

(a) 1 Russ. 827, 3rd edition, 757. 4th edition.

in another; and it enacts that, where the offence "shall be begun in one county and completed in another," it may be "dealt with," &c., "in any of the said counties in the same manner as if it had been actually and wholly committed therein." It would go far to frustrate this provision if it were held that, wherever it was intended to apply it, the indictment should specify a portion of the transaction which constituted the offence as having happened in one county, should show then the portion of it which happened in another, and trace the connection between them, so as to establish, in statement, that they constituted one and the same transaction. Such particularity of statement would obviously involve the risk of constant failure, from variance between statement and proof, on grounds wholly beside the merits. The plain import of the section is, that the accused party may be indicted as if the whole offence had been committed in one county, and that proof that the offence was begun in one county and completed in the other, should sustain the indictment so framed.

It was suggested, in the course of the argument, that no serious difficulty or embarrassment could be caused by the construction for which the prisoner's Counsel contended, in the prosecution of persons charged with offences committed within the prescribed limits, because it would be always in the power of the prosecutor to allege in the indictment that the offence was committed within those limits, thus accommodating his allegation to his proofs. But to adopt this suggestion would be, not to take away the impediment from which it was the object to relieve the prosecutor, but only to shift it to another ground. If the prosecutor alleges, for example, in the indictment preferred in the county A, that the offence was committed in the county B, within 500 yards of the boundary, he binds himself to prove that the offence was committed, not in county A but in county B, within 500 yards of the boundary line. He may fail to do this in several ways—either by the want of clear proof of the exact spot at which the offence was committed, or by the difficulty of proving the boundary of the two counties, or even by proof that it was in fact perpetrated within the county in which the venue was laid. It may be shown clearly that the offence was committed

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at one side or the other of the boundary line; but, if the evidence leaves it uncertain at which side it was committed, the probability is that the accused, though his guilt has been established, will be acquitted on account of that very uncertainty. Again, suppose (as was also suggested) that the indictment enlarges the sphere of proof, by alleging that the offence was committed within the space of 500 yards, to be considered as measured at each side from the boundary line, comprising a space of 1000 yards wide, still the prosecution may be exposed to precisely the same kind of difficulty, though in reference to a different place. The proof may, notwithstanding the most careful preliminary inquiries, leave it doubtful whether the crime was committed within the prescribed limits, or without those limits, though within the county in which the venue is laid. Suppose, for instance, a disputed boundary existing at some undefined line along the summit of a hill or mountain, or through a bog, the line of the 500 yards' limit must take the same direction as the boundary to which it ought to be parallel, and will necessarily partake of the uncertainty of that boundary; and thus a prosecution which would have succeeded if the venue had been the county simply, and without more, may fail, because the indictment was framed under this statute in the manner proposed, and because the proof does not support the allegation that the offence was committed within the limits prescribed by the Act of Parliament—nay even though it establishes that the offence was actually committed within the body of the venue county.

These views of the section, minute as some of them may appear, tend to show that its true interpretation is to be found in a close adherence to its plain words. It says that, where the offence shall be committed within 500 yards of the boundaries of two or more counties, such offence may be "dealt with," &c., *in the same manner* as if it had been actually committed therein. What it so says is inconsistent with requiring different procedures in the two cases. The offence so committed cannot be "dealt with, inquired of, tried, determined, and punished in the same manner," if the indictment is to be framed in a different manner; or if proof, which would sustain

the indictment in the one case, must, upon an indictment similarly framed, defeat it in the other.

Mr. *Montgomery* and Mr. *Molloy*, in their able arguments, referred to several statutes which have, from time to time, relaxed the strict rule of the Common Law in reference to venue in criminal cases, and which have enabled the prosecutor to lay the venue in one county, and to prove that the crime, or some essential facts forming part of it, occurred in another; and they ranged those statutes in two classes, namely, those in which the prosecutor was, by the express terms of the legislation, empowered to "lay" or "charge" the offence as having occurred in the county of the venue, and to prove it to have been committed in another county, and those in which no such power was in terms conferred. And they argued that the phrases "may be indicted," where it occurs in any of these statutes, places it in the first class, and that such phrases as "dealt with, inquired of, tried, determined, and punished," without more, indicate that the statute which contains them belongs to the second class, and that it does not authorise the trial in one county of an indictment simply charging that the offence was committed in another, although the case may otherwise be within the Act, and although it may be capable of being dealt with by an indictment stating the special facts which give jurisdiction in the county in which the venue is laid.

Some authorities were then cited, for the purpose of showing that, under the statutes of the second class, it was held necessary to aver certain facts which gave jurisdiction in the county in which the venue was laid.

Under the 9 G. 4, c. 31, s. 22 (*Eng.*), the offence of bigamy might have been "dealt with, inquired of, tried, determined and punished" in the county where the offender should be apprehended or be in custody, as if the offence had been actually committed in that county; and the prisoner's Counsel cited *Regina v. Frazer* (a), in which it was held that it was necessary, in an indictment for bigamy in a county in which the offence was not committed, to show that the prisoner was in custody in the county in which

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he was indicted and tried. That decision was, however, reviewed in subsequent cases; and the result appears now to be that, where the indictment states the offence of bigamy to have been committed, not in the county of the venue, but in another county, there, since on the record the Court would appear upon that statement to be without jurisdiction, it must in some way appear by the same record that the prisoner was in custody, in order to answer and remove, by that fact appearing on the record, the effect of the other statement. But it has been held that this will sufficiently appear, when the record is made up, by the caption, which must necessarily show that the accused was in custody. *Regina v. Whiley* (a), explained in *Regina v. Smythies* (b), in which a similar decision was made in a case of forgery, under the 11 G. 4, and 1 W. 4, c. 66, s. 24. *Rex v. Mellor* (c) was also cited at the Bar; but that case only decided that, under the statute 38 G. 3, c. 52, which empowered a prosecutor to prefer in an adjoining county a bill of indictment for an offence committed in a county of a city or a town, the indictment, though it might be preferred in the adjoining county, yet ought to state the offence to have been committed in the county of the city or town. That statute only enacted that "Such bill of indictment shall be valid and effectual as if it had been found" in the county of the city or town. The Act contains no such words as those of the 9 G. 4, c. 54, s. 26. *Rex v. Goff* (d) was also cited. That case was decided upon the same statute as *Rex v. Mellor*, and the point ruled was, that the omission to aver that the county of Hants was the next adjoining county to the county of the town of Southampton was immaterial, since, when the record was made up, it might appear in the memorandum or caption. The case of *Rex v. Windham* (e) was cited, not, I believe, for the decision (which does not affect the present question), but for the purpose of showing that the course adopted in indicting, in an adjoining English county, for an offence committed in a county in Wales, under the 26 Hen. 8, c. 6 (when that statute was in force), was to lay the offence, according to

(a) 2 M. C. C. 186; S. C., 1 Car. & Kir. 154.

(b) 1 Den. 498.

(c) Russ & R. 144.

(d) Russ. & R. 179.

(e) Russ. & R. 197.

the fact, as having been committed in the Welsh county; and undoubtedly it would seem that such a mode of pleading was adopted while that statute was in force, although it provided that the offenders should be indicted, "according to the laws of this land, in like manner and form" as if the offence had been committed "within any of the shires within the said realm." It would be now difficult to trace the course of precedent upon this subject under that Act passed in the reign of Henry the Eighth; but any analogy which may be supposed to be furnished by that statute cannot control the construction of the Act of Parliament with which we are dealing, passed for a purpose as to which there is nothing analogous in the Act of the 26 *Hen.* 8, c. 6. I believe it has also been not unusual, in indictments for bigamy, to lay the marriages as having been solemnized in the counties in which they actually took place; although it would appear, from the precedent in 2 *Starkie's Criminal Law*, p. 434, that this is not always the course of pleading.

The number of Acts of Parliament authorising the trial, within one county or jurisdiction, of persons accused of crimes committed within another, is very great. Their provisions vary; in some, express provision is made that the indictment may charge the offence as committed in the venue county; in others, that provision is not to be found, but words of wide import are employed. In some, we find the words "indicted, inquired of, tried and determined;" in others, the word "indicted" is omitted, and the phrase "dealt with" is employed; in others, we find both "indicted" and "dealt with." The object of them all appears to be, to facilitate prosecutions, by unfettering the pleader from the difficulties imposed by the rule of the Common Law, requiring that parties accused of crimes should be tried in that county or jurisdiction only in which the offences were actually committed; and, although no decision exactly in point has been found upon the statute now before us except that of *Regina v. Brown*, instances have occurred in which the disposition of the Courts has been shown to sustain and advance the purpose of those enactments. In *Regina v. Hinley (a)*, mentioned to me by my Brothers BARON FITZGERALD and O'BRIEN, the

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indictment was against George Hinley the elder and George Hinley the younger. It charged, in the first count, George Hinley the younger with larceny of a large quantity of leather, and a large number of boots and shoes. It charged, in the second count, George Hinley the elder with having received those goods knowing them to be stolen; and it charged, in a third count, George the elder with having received goods before then stolen, knowing them to be stolen. The indictment was preferred, the venue was laid, and the case was tried in Yorkshire. The larceny and the receiving were throughout the indictment stated to have taken place in Yorkshire. The proof was, that the larceny took place in Yorkshire, and the receiving in Lancashire. It was objected for George the elder that there was no proof of receiving in Yorkshire, where the receiving was laid. It was contended that this was not a case that was aided by the 7 & 8 G. 4, c. 29, s. 56, which enacted that the receiver, whether charged as an accessory after the fact of the felony, or with a substantive felony, or with a misdemeanor only, may be "dealt with, indicted, "tried, and punished in any county or place in which he shall have "or have had any such property in his possession, or in any county "or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the "county or place where he actually received such property." *Rex v. Mellor* and *Rex v. Frazer* were there cited, as here, on the part of the prisoner. Mr. Justice Maule, before whom the case was tried, overruled the objection, and held that the statute 7 & 8 G. 4, c. 29, s. 56, "justified this method of indictment;" and both prisoners were convicted. The language of that indictment in no way differs from that of the 9 G. 4, c. 54, s. 26, save that in the former the word "indicted" occurs, which is not in the latter, and that in the latter the words "inquired of" occur, which are not in the former; differences which seem too small to warrant the application to the two statutes of different rules of construction. In *The Queen v. Mitchell* (a), a misdemeanor was committed in that part of the borough of Stamford which is situate in Northamptonshire, within

(a) 2 Q. B. 636.

500 yards of the adjoining county of Lincoln. An indictment charging this offence was found against the defendant at the Quarter Sessions for the borough of Stamford; the venue being "Borough of Stamford to wit," and the material facts being alleged to have occurred in a parish (named) in the county of Northampton.

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The indictment was returned into the Court of Queen's Bench by *certiorari*, and by some inadvertence, the *venire* under which the case was directed to be tried was issued, not to the county of Northampton, but to the county of Lincoln, in which the other parts of the borough of Stamford were situated. At the trial, and afterwards before the Court of Queen's Bench, it was objected that there was a fatal defect in the proceedings, the offence being alleged to have taken place in one county, and the *venire* having been issued to, and the trial had in another. The Court of Queen's Bench arrested the judgment, on the ground that the *venire* had issued to a wrong county, in which it appeared on the record that there was no authority to try the case. It was urged upon the Court in argument that, as the offence was committed within 500 yards of the boundaries of the two counties, the indictment could have been tried in either. But the Court held that the award of a wrong venue was not cured by 9 G. 4, c. 64, s. 12, though they intimated their opinion that the statute would have afforded an answer to the objection if the offence had been laid and tried in either county. Mr. Justice Patteson said "The correct answer was given to the argument, that this offence was committed within 500 yards of the boundary between the two counties. In such cases you may lay and try the offence in which of the counties you please, but you must try it where you lay it." In the course of the argument, Lord Denman stated that the effect of the statute was, that "it merely extended the boundary of the county 500 yards." The opinions expressed by the Court on this subject, in *The Queen v. Mitchell*, do not amount to a decision as to the course of procedure under the Act of Parliament, because the case was ruled upon another ground; but they are the clearly expressed opinions of Judges of high authority dealing with an argument founded on the statute, which they overruled; and those

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opinions directly support the course of procedure adopted in the case now before us. In *Regina v. Sharpe (a)*, the prisoners were tried in Middlesex, for larceny and receiving of goods, which were conveyed along a journey by servants of the owners in a waggon, not a public conveyance. The offence was committed in Kent. It was admitted by the prisoners' Counsel that no doubt the prisoners "were properly tried in Middlesex," if the 7 G. 4, c. 64, s. 13, applied to journeys not made by carriers or public conveyances. The Court of Criminal Appeal held that the statute applied to any carriage whatever employed on any journey. The frame of the indictment is not stated; but the admission of the prisoners' Counsel appears to indicate that the indictment was in the common form, laying the venue in Middlesex. If so, the question might have been raised with which we are now dealing. It would have been plainly open upon such an indictment; but the prisoners' Counsel did not make the objection.

On the whole, we are of opinion that the objection made at the trial cannot be sustained; and the result of course will be, that, under the statute 11 & 12 Vic., c. 78, we must "affirm the judgment."

I wish to say for myself that, if I had not the concurrence of so many of my Brethren, I should hold the opinion which I have formed with considerable distrust, when I find it encountered by that of my Brother HAYES, whose acquaintance with the Criminal Law has been long recorded in a manner so favourably known to the Profession.*

(a) 7 Dearsly, C. C. 415.

NOTE.—The case of *Regina v. Brown* (Cr. & Dix, A. N. C., p. 46), is also reported, in a short note, in 6 *Law Recorder*, N. S., p. 90, a work which was edited by two gentlemen of the Bar, one of whom (Mr. Ross Moore), belonged to the North East Circuit, on which the county of Monaghan was situated. Mr. Dix, one of the Reporters of C. & D., A. N. C., was also a member of that Circuit. The case of *Regina v. Brown* was cited, as a governing authority in reference to venue, in two text-books on the Criminal Law of Ireland—1 *Hayes's Criminal Law*, p. 913, published in 1842, and *N. Purcell O'Gorman's Criminal Law*, pp. 55 and 385, published in 1849.—[The L. C. B.]

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(*Queen's Bench.*)

May 23, 27.

DEMURRER.—The action was one of libel. The summons and plaint contained two paragraphs, in the first of which the plaintiff complained that whereas the said plaintiff, for a long time before and at the time of the committing of the grievances, &c. had been, was and still is, an attorney-at-law, a solicitor in the High Court of Chancery, and her Majesty's Proctor in Admiralty causes in Ireland, and

Privileged communication.

The plaintiff, an attorney, solicitor, and proctor, declared on a libel contained in a letter addressed to the Incorporated Society of Attorneys and Solicitors, of which plaintiff was a member, which letter charged the plaintiff with having accepted a retainer from the defendant in a suit then pending, and having afterwards taken up the opposite side of the same case. The defendant pleaded that he had engaged the plaintiff as solicitor in a certain matter, and the plaintiff afterwards, without notice to the defendant, took up the other side; that the defendant then named one R. to accept service of the writ for him, yet the plaintiff had him the defendant served by a common bailiff, and that the defendant felt aggrieved by that conduct, and *bona fide* believed that the same was unprofessional and improper, and calculated to affect injuriously the character of the profession to which plaintiff belonged; and that it was the duty of the defendant, as a member of society, and as such interested in the good conduct of the members of said profession, to bring the said conduct of the plaintiff under the notice of those who were also interested in the good conduct of said members, and had the power and duty of inquiring into the conduct of the said members, and of preventing the repetition of improper or unprofessional conduct; and that defendant *bona fide* believing that the said society had full power, and that it was the duty of the said society to make such inquiry as aforesaid into the conduct of the members of the said profession, and to prevent the repetition, &c., wrote the said letters, with the *bona fide* object of procuring such inquiry, and of preventing the repetition of such conduct.

Held (dissentiente FITZGERALD, J.), that the demurrer should be overruled.

Held, by FITZGERALD, J. (dissentientibus O'BRIEN and HAYES, JJ.)—That this plea did not show any personal interest in the defendant, nor any duty incumbent on him.

Held also, by FITZGERALD, J.—That an attorney is not justified in accepting an undertaking to accept service of a writ.

Held, by HAYES, J. (dubitante LEFROY, C. J.)—That the Courts have recognised the authority of the Law Society as to the supervision of the profession of attorneys.

Held also, by HAYES, J. (dissentiente FITZGERALD, J.)—That an attorney being, in the practice of his profession, a public man, every individual discharges a duty in doing his utmost to maintain the profession in its purity and integrity.

Held, by O'BRIEN, J. (dissentiente FITZGERALD, J.)—That, apart from social duty, the defendant had sufficient interest in the matter of the complaint to sustain his plea.

Held also, by O'BRIEN, J.—That, where the plea shows grounds of privilege, though they are not the grounds of privilege the defendant has relied on in the plea, the plea is good.

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had exercised and carried on his said profession and business of an attorney, solicitor, and proctor, with great credit and reputation; and whereas the plaintiff was, at the time of the committing of the said grievances by the said defendant, a member of the Incorporated Society of Attorneys and Solicitors of Ireland; which Society is composed of the leading members of the said plaintiff's said profession; and the said plaintiff always hitherto was held in great esteem and respect in said Society, and by the members thereof; and whereas the said plaintiff, as such attorney as aforesaid, had been retained and employed by one Salvatore Cafiero, captain of the brig Salem, to prosecute an action against the said defendant, to recover of and from the said defendant a claim which the said Salvatore Cafiero had against the said defendant for freight; yet the said defendant, knowing the premises, but contriving and intending to injure the said plaintiff in his said credit and reputation, and also in his said profession and business, and to cause it to be suspected and believed, and especially by the members of the said Society, that the said plaintiff had conducted himself dishonestly and improperly in relation to the said action, and that the said plaintiff was unfit to be a member of the said Society, on the 26th day of January 1863, falsely and maliciously wrote and published a false, scandalous, malicious, and defamatory libel, of and concerning the said plaintiff, and of and concerning him in respect to his said business and profession, in a certain letter addressed to the se-

Held also, by O'BRIEN, J.—That the Incorporated Society had such concern in the matters of the complaint, in respect of interest or duty, as rendered the communication privileged.

Held also, by O'BRIEN, J.—That *bona fides* and the absence of malice are necessary to sustain a plea of privilege.

Held also, by O'BRIEN, J.—That the conduct alleged in the plaintiff was unprofessional and improper.

Held, by LEFROY, C. J.—That, on the whole record, the plaintiff was disentitled to the judgment of the Court, because inasmuch as he had demurred simply, instead of asking leave to reply and demur, and so admitted the charge which was the sting of the libel, he lost his right to recover damages in the action.

Semble, by LEFROY, C. J.—That the plea should have shown that the Law Society had power to investigate the charge.

Semble (by FITZGERALD, J.)—That, if the averments in the plea had corresponded with the statements in the letter, the plea would have been embarrassing.

cretary of the said Incorporated Society; that is to say, "Sir" (meaning, &c.; the merely technical innuendoes throughout are omitted, for the sake of greater brevity) "we now beg to inform "you that, on or about the 1st of December last, we engaged "John J. Hamerton to act for us in a case then pending, *Cafiero* "v. *Green*. We can prove the said Mr. Hamerton of Sackville- "street agreed to act for us, and were astonished, some time "afterwards, to find he had, without any notice whatever, changed "his mind, and taken up the case for the plaintiff." (Meaning the said *Cafiero*, and meaning thereby that the said plaintiff had betrayed his duty as an attorney and solicitor, and that, after the said plaintiff had been retained by the said defendant to act as his the said defendant's attorney in the said action of *Cafiero v. Green*, and after the said plaintiff had been intrusted with the case of the said defendant, the said plaintiff, wrongfully and without any just cause, and contrary to his duty as an attorney, and in betrayal of the confidence placed in him, the said plaintiff, by the said defendant, acted as the attorney for the said *Cafiero* in the said action).—"This circumstance, coupled "with his conduct since" (meaning thereby that the said plaintiff had since acted improperly, and in a manner unbecoming his said profession as an attorney, solicitor and proctor), "induced us to "lay the case before your respectable body, trusting you will "deal with it as it deserves." (Meaning thereby that the said plaintiff's conduct was so bad that it deserved the censure of the said Incorporated Society of Attorneys and Solicitors of Ireland, and that the said plaintiff ought to be punished by the said Society). "We shall be glad to give you any further information on the subject you may require." (Meaning thereby that the said defendant had in his possession, and could give further information in relation to the conduct of the said plaintiff, which would prove that the said plaintiff was an unfit and improper person to be a member of so respectable a body as the said Incorporated Society, and that it would be a pleasure and gratification to the said defendant to communicate such information

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T. T. 1863. to the said Society), "and are yours, resply., GREEN, Brothers."

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The second paragraph set out the libel without innuendoes.

The third defence, which was pleaded to both paragraphs, identified the letters therein set forth, and stated that, before the writing or publishing, &c., one William Richardson, as attorney for and on behalf of the said Salvatore Cafiero, in said plaint mentioned, had applied to defendant for payment of a certain balance of freight, claimed by the said Salvatore Cafiero to be due to him by defendant; and that thereupon the defendant had engaged the plaintiff, and the plaintiff had agreed to act as attorney for the defendant, in reference to the said claim of the said Cafiero, and any proceedings which might be taken at suit of said Cafiero against defendant on foot thereof; and defendant saith that the plaintiff afterwards, and without notice to defendant, changed his mind, and took up the case of said Cafiero, and acted as attorney for said Cafiero against defendant; and defendant saith that, after the plaintiff had so taken up the case of the said Cafiero, and acted as attorney for him against defendant as aforesaid, and after the defendant, at the request of the plaintiff, had named an attorney on the part of the defendant, to wit, said William Richardson, to accept service, on behalf of said defendant, of a writ of summons and plaint at the suit of said Cafiero against defendant, the plaintiff nevertheless did not nor would send said writ to said William Richardson, to accept service for defendant as aforesaid, but employed and instructed a common bailiff to serve said writ publicly on defendant. And defendant saith that he felt aggrieved by the aforesaid conduct of the plaintiff, *and bona fide believed that the same was unprofessional and improper, and calculated to affect injuriously the character of the profession to which plaintiff belonged;* and that it was the *duty* of the defendant, *as a member of society, and, as such, interested in the good conduct of the members of said profession,* to bring the said conduct of the plaintiff under the notice of those who were also interested in the good conduct of said members, and had *the power and duty of inquiring into the conduct of said members, and of preventing the repetition of improper or unprofessional conduct* on the part of any of the

said members. And defendant saith that, at and previously to the writing, &c., the Incorporated Society, &c., was a Society composed of the leading members of said profession, and had been incorporated for the general benefit of said profession; and that defendant, *bona fide believing that the said Society had full power, and that it was the duty of the said Society to make such inquiry* as aforesaid into the conduct of the members of the said profession, *and to prevent the repetition of* improper and unprofessional conduct on the part of any of said members, wrote and sent to the said Society the said letter in the first and second counts respectively mentioned, with the *bona fide object of procuring such inquiry* as aforesaid to be instituted into the said conduct of the plaintiff, *and for the purpose of preventing the repetition* thereof, in case it should be found to be improper and unprofessional, which is the writing, &c. And defendant saith he wrote and published said letter, being a privileged communication, and on a lawful occasion, and that he wrote and published the same in good faith, and without malice, and believing the statements therein contained to be true in substance and in fact; and therefore he defends the action.

To this defence the plaintiff demurred, on the ground that the matter and circumstances therein stated, in manner and form as the same are pleaded, are insufficient in law to constitute the writing and publishing the said letter a privileged communication.

Todd (with him *Macdonogh*) opened the argument on the demurrer.

The letter states that the defendant's object in writing the letter to the Law Society was the trust that they would deal with the plaintiff's conduct as it deserved.—[HAYES, J. What is the misconduct of which the defendant complained that the plaintiff had been guilty?—In the letter his grievance was, that the plaintiff had changed sides, and taken up the case of the plaintiff in the action of *Casiero v. Green*. But in this defence the grievance stated is, that he (the now defendant) was *publicly* served with the writ in that action by a common bailiff, though he

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had appointed an attorney to act for him, and had informed Mr. Hamerton of that circumstance.—[FITZGERALD, J. There is nothing wrong in serving a defendant by a common bailiff. According to the present law and practice, an attorney would act very wrongly who would take an undertaking to appear and defend. I do not know how he could enforce it.]—Then the question is, simply, whether the letter is protected by the occasion on which it was written? The definition which was given of a privileged communication by Parke, B., in *Toogood v. Spyring* (a), has been adopted ever since.—[FITZGERALD, J. That definition has been greatly extended since then.]—Not exactly extended; but cases have arisen which are not within the precise definition given in that case. The very same doctrine has been recently laid down in *Harrison v. Bush* (b). The duty which induces a man to make the communication must be, not merely a duty which is universally imposed on all mankind, but must be peculiar and individual to himself. In all the analogous cases in England this question arises on the evidence given under the general issue. In this country it arises on the pleadings; and the decisions show that there must be an interest and duty personal to the man who makes the communication: *Prager v. Shaw* (c); *Davis v. Reeves* (d); *Ede v. Scott* (e); *Bell v. Parke* (f). It is the province of the Judge to tell the Jury whether the occasion was privileged; but it belongs to the jury to find that there was express malice: *Coxhead v. Richards* (g). The duty which confers the privilege must exist independently of the party's *bona fide* belief that it is his duty to make the communication—[per Cresswell, J., p. 604].—*Blackham v. Pugh* (h) is to the same effect. The present defence alleges that the communication was made because it was the duty of the defendant, *as a member of society*, to make it. That is far too general and large a duty. It would confer a privilege on almost every communication that can be made.—[HAYES, J. Here

(a) 1 Cr. Mee. & R. 193.

(c) 4 Ir. Com. Law Rep. 460.

(e) 7 Ir. Com. Law Rep. 609.

(g) 2 C. B. 569.

(b) 5 Ell. & Bl. 348.

(d) 5 Ir. Com. Law Rep. 79.

(f) 10 Ir. Com. Law Rep. 279.

(h) 2 C. B. 611.

there is something more than that; for the profession of attorneys is of great importance, and the welfare of society is much bound up with their good conduct; and may not every member of society be said to have an interest in their well-being?—No doubt, every member of society has an interest in their well-being; but not such a personal interest as will confer a privilege on a communication of this character.—[O'BRIEN, J. This communication was not even made by the defendant with a view to obtain redress for himself.—FITZGERALD, J. In the case known as *Lord Palmerston's case* the communication was made by a man who wished to obtain redress for himself.]—Just so; and, if this communication was privileged, every communication made by a common informer would also be privileged. In *Martin v. Strong* (a) the privilege contended for was held to be too large, because there might have been 10,000 subscribers in London.

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This defence is also bad, having regard to the body to whom the communication was made. It is not alleged that they had power to give redress, or to prevent even the repetition of the misconduct. The decision in *Fairman v. Ives* (b) was based on the ground, it was supposed, that the Secretary at War had the authority. In *Blagg v. Sturt* (c) the communication was held not to be privileged, because the Secretary of State had not the requisite authority; and in *Harrison v. Bush* (d) the decision went upon the ground that an application to the Home Secretary might be considered to be an application to the Queen herself.

Sidney (with *Purcell*), contra.

There need not exist such a personal duty or interest as involves a legal necessity to make the communication. The first question is, whether the Law Society was a fit tribunal to which the defendant should address his complaint, with a view to the institution of an inquiry into the plaintiff's conduct? If it was not, a question will then arise, whether the defendant's *bona fide* belief that it was so will protect him? The Law Society was incorpo-

(a) 5 Ad. & Ell 535.

(b) 5 B. & Ald. 642.

(c) 10 Q. B. 905.

(d) 5 El. & Bl. 344.

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rated by royal charter on the 5th of April 1852.—[FITZGERALD, J. Can we take notice of that charter? It is not set out in the defence; and it is not a document of which we can take judicial cognizance.]—But it appears on the pleadings that the Law Society is an incorporated body. In the case of *Bell v. Parke* (a), reference was made to the Articles of War.—[FITZGERALD, J. For all that we can know, the Law Society may be incorporated as a company. The charter should have been set out in the defence.]—Surely the Court can take cognizance of a royal charter referred to in the defence.—[HAYES, J. No; the only question is, whether it is sufficiently stated in the plea to allow of our reading it? I do not think that it is.—FITZGERALD, J. If anything turned upon the charter, it would be open to you to apply to amend the defence by setting out the charter.]—At present, the matter will not be further pressed on the Court. But the defendant is entitled to put it in this way, that the Law Society has been incorporated for the general benefit of the profession of attorneys and solicitors, and that a complaint made to such a body, and submitting to their consideration an alleged act of misconduct of the defendant, who on this record admits himself to have been at that time a member of that society, is privileged; and it is not necessary that the person or body to whom the complaint was made should in fact have the power to give redress. It is enough if that person or body can put the matter in a train to enable redress to be obtained. From reported cases it appears that the Law Society is recognised as such by the different Courts. For instance, it appears on motions touching the admission of attorneys under unusual circumstances: *In re M'Nally* (b).* The communication is privileged if the writer has a personal interest in the subject-matter of the publication, believes that the act done injures generally the profession to which the party who did it belongs, and

(a) 10 Ir. Com. Law Rep. 279.

(b) 3 Ir. Com. Law Rep. 576.

* On the 27th of May, in this Term, the Law Society was heard by the Court on an application which it made, that the case of *Scovell v. Gardner* should not be heard, as the attorney for the defendant was an attorney in England, but not in Ireland.

believes that the body or person to whom the communication was addressed had power to give redress.—[O'BRIEN, J. Do not forget that the defendant did not say in the letter that he sought redress.] —It is not necessary that the defendant should have been in search of redress, or soliciting anything for himself. The belief that another man has done an act contrary to the etiquette of the society of which he is a member, is an adequate justification to any one of the public who brings such conduct under the notice of the Society. *Bell v. Parke* (a) does not apply to the present case, because it was admitted that there was a sufficient duty cast on the defendant if he had taken the proper course. In that case the pleading was vicious, on two grounds: it did not aver that the party to whom the complaint was made had any power to entertain, or even to receive the complaint, with a view to institute an inquiry; neither was it averred that the charge was made for the purpose of promoting an inquiry. Again, in *Ede v. Scott* (b), the plea did not justify the charge of felony. Also, *Blagg v. Sturt* (c) has on this point been substantially overruled; for, in *Harrison v. Bush* (d), Lord Campbell, C. J., said that the decision in *Blagg v. Sturt* was to be upheld, on the ground that in that case there was evidence of express malice on the part of the defendant: but plainly he was of opinion that it could not otherwise be supported. *Blackham v. Pugh* (e) shows that it is sufficient if "a party having sustained a grievance, or that which he thought a grievance, has addressed a complaint to a person whom he supposed capable of redressing it, and, in so doing, has used defamatory language." If there are reasonable grounds for the man's belief that the party had power to give redress, that belief confers a privilege: *Wenman v. Ash* (f); *Woodward v. Lander* (g); *Fairman v. Ives* (h); *M'Dougall v. Claridge* (i); and *Harrison v. Bush* (k).—[FITZGERALD, J. Any person else in

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(a) 10 Ir. Com. Law Rep. 279.

(b) 7 Ir. Com. Law Rep. 609.

(c) 10 Q. B. 899.

(d) 5 El. & Bl. 354.

(e) 2 C. B. 623.

(f) 13 C. B. 844-45.

(g) 6 C. & P. 548.

(h) 5 B. & Ald. 642.

(i) 1 Camp. 267.

(k) 5 El. & Bl. 344.

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the community might have addressed this letter to the Law Society just as well as your client; he had no personal interest in doing so, if he had no duty.]—To a certain extent he had an interest beyond what the other members of society had. But it is sufficient that he did the act on public grounds.—[O'BRIEN, J. The defendant has not alleged any particular ground for writing the letter, by reason of any wrong done to himself, which would not be open to any other member of society. Anyone in Court might apply to the Law Society to prevent the repetition of such conduct.]—It is not absolutely necessary for a defendant to specify the particular redress which he sought.—[FITZGERALD, J. Is not the case of *Harrison v. Bush* to be distinguished on the ground that the complaint was made of a Justice of the Peace as such; and that is a character in which every member of the public has an interest?]—And an attorney is an officer of this Court, engaged in the administration of justice, and in whose character every member of society has an interest. In *Turnbull v. Bird (a)*, *belief* was held a privilege.—[FITZGERALD, J. In that case, Erle, C. J., distinctly puts the privilege on the ground that the publication was a commentary on the acts of a public man—a man who held a public situation, and whose conduct the defendant had a right to criticise.]—He goes further, and says that the defamatory matter was privileged, if published in the exercise of a *right*, “as a matter necessary to the protection of the public interests, or the exercise of a public ‘right’”—[FITZGERALD, J. Erle, C. J., said:—“And the law is, that a man may publish “defamatory matter of another holding any public employment, “if it is a matter on which the public have any interest, within “the limits I will lay down, in accordance with decided cases.” That is wholly inapplicable to the present case.]—The plaintiff here is in the position of a man discharging public duties. “If “the occasion be such as repels the presumption of malice, the “communication is privileged”—*per* Lord Campbell, C. J., in *Taylor v. Hawkins (b)*. A direct personal interest in the subject-matter of the communication is not always requisite to confer a

(a) 2 F. & F. 508.

(b) 16 Q. B. 321.

privilege: *Todd v. Hawkins* (a).—[LEFROY, C. J. But that was a case in which the defendant had written a private letter to a near relative.]

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Macdonogh, in reply.

There is a clear rule, established by the authorities, whereby to determine whether a man brings himself within the limited privilege of the occasion. The rule is that the matters of fact which evidence the occasion creating the privilege must be expressly averred upon the record; and those matters, which must be so expressly averred upon the record, must bring the case to range within the rule that a communication, made *bona fide* on any subject-matter touching which the party making the communication has an interest or a duty, is privileged if made to a person who has a corresponding interest or a duty, although such communication contains criminating matter which, without that privilege, would afford a ground for an action: *Harrison v. Bush* (b), acted on in *Dickson v. Earl of Wilton* (c). It will not therefore suffice for a defendant to plead that he *believed* that he had a duty or an interest, and that he *believed* that the party to whom he made the communication had a corresponding duty or interest. No Judge sitting at Nisi Prius could act on such a statement of *belief*: the Judge must act on the facts as proved, and cannot tell the jury that the privilege existed because the writer *believed* that he had an interest in the subject-matter of the communication, and that the party to whom he addressed the communication had a corresponding interest. The existence and the *bona fides* of the *belief* are for the jury to decide upon: to the Court alone belongs the duty of deciding whether the occasion was one of that nature which creates a privilege.—[FITZGERALD, J. In *Harrison v. Bush*, Lord Campbell put several instances, and used language which would lead to the conclusion that he thought that *belief* would be sufficient if reasonable grounds for it existed—if the defendant had reasonable grounds for believing, and

(a) 8 C. & P. 88.

(b) 5 El. & Bl. 349.

(c) 1 F. & F. 426.

T. T. 1863. did *bona fide* believe that the tribunal to which he addressed himself
Queen's Bench had power to give the redress for which he applied.]—No doubt,
 HAMERTON there must be at least both such a *bona fide* belief and reasonable
 v. grounds for entertaining it.—[O'BRIEN, J. But does any case show
 GREEN. that, though there were such reasonable grounds *and* such *bona fide* belief, those elements would be sufficient to impart a privilege to the communication?]
 —No; but the same rule on which the defendant relies has been substantially laid down in the cases already cited of *Woodward v. Lander* (a), *Coxhead v. Richards* (b), and *Fairman v. Ives* (c).

Cur. adv. vult.

FITZGERALD, J.

June 2.

This case was argued before us on the 27th of May 1863. The question arose upon a demurrer to the third defence. The plaint was in libel, and contained two counts. The alleged libel, as I have abstracted it, without the innuendoes, is very short, and purports to be a letter written by the defendant, Mr. Green, to the Incorporated Society of Attorneys and Solicitors for Ireland. [His Lordship, having read the letter, proceeded.] That is the document which is charged to be a defamatory libel, and the publication of which is the subject of this action. It is necessary for me to advert to the plaint, only for the purpose of pointing out that in the first count the innuendoes are of a very extensive character. [His Lordship here stated the important innuendoes.]

The second count is founded on the same libellous publication, but contains no innuendo. But the third defence, to which the demurrer has been taken, is pleaded to both counts. I advert to the extensive character of the innuendoes in the first, not because I intend to found my judgment upon them, but as pointing out one of the difficulties which this case involves,—namely, that which arises upon the construction of the Common Law Procedure Amendment Act, 1853. Two cases have been decided, that is to say, *Hemmings v. Gasson* (d), which has been followed by the

(a) 6 C. & P. 548.

(b) 2 C. B. 595.

(c) 5 B. & Ald. 642.

(d) 9 El. & Bl. 346.

Court of Exchequer Chamber in this country, in the case of *Lavelle v. Oranmore* (a), which appears to have disturbed the old rule; and go to show (if they are well decided) that it is for the jury alone to determine whether the words of the libel were spoken in the meaning assigned to them in the plaint, and that the Court is not to perform its old duty of deciding in the first instance whether the words of the libel are capable of bearing that meaning. In fact, the innuendo is now wholly referred to the jury: and where a defendant pleads in excuse or justification, he adopts the meaning which has been assigned to the publication as stated by the pleader on the opposite side. Now the third defence is not a defence in justification, but is one in excuse—the common defence of privileged communication: and is in substance this:—that, before the publication of the letter in question, an attorney acting for and on behalf of Cafiero had applied to the defendant for payment of a balance of freight claimed by Cafiero from the defendant, and that thereupon the defendant engaged the present plaintiff, and the plaintiff agreed to act as attorney for the defendant in reference to the claim of Cafiero, and in any proceedings which should be taken at his suit against the defendant on foot thereof to act on his behalf. But that afterwards the plaintiff, without any notice to the defendant, took up Cafiero's case, and that, after the defendant, at the plaintiff's request, had engaged another attorney to accept service for him of the summons and plaint, the plaintiff nevertheless had the defendant publicly served therewith by a common bailiff; that the defendant felt aggrieved at such conduct, which he *bona fide* believed to be unprofessional and improper, and calculated to affect injuriously the character of the plaintiff's profession; that it was the duty of the defendant, as a member of society, and as such interested in the good conduct of the members of that profession, to bring the plaintiff's conduct under the notice of those who were also interested in the good conduct of the members of that profession, and had the power and duty of inquiring into their conduct, and of preventing the repetition of improper or unprofessional conduct on their part;

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(a) 7 Ir. Jur., N. S. 55.

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that the Law Society, at and previous to the publication of the letter, was composed of the leading members of the profession, for the general benefit of which it had been incorporated; that the defendant *bona fide* believing that the Society had full power, and that it was their duty to make such inquiry into the conduct of the members of the profession, and to prevent the repetition of improper or unprofessional conduct on their part, sent the letter to the Society, with the *bona fide* object of procuring such inquiry to be instituted into the plaintiff's conduct, and for the purpose of preventing its repetition in case it should be found to be improper and unprofessional; that he wrote and published it as a privileged communication on a lawful occasion, and in good faith and without malice, and believing the statements therein to be true. That is in substance the whole of this defence; and it would appear upon its face that the defence is not one of justification but one of excuse. It does not justify the publication as true; but on the contrary it falls short of stating the absolute truth, in a material particular. For, whilst the letter charged to be a defamatory libel alleges that Mr. Hamerton accepting a retainer in a *pending* suit and, after having acted in that pending suit, in violation of his duty, changed sides and became attorney for the plaintiff, it appears from the plea in excuse that *no* suit was *then* pending at all; but that, a suit being contemplated or threatened in respect of a demand for freight, the defendant Mr. Green applied to Mr. Hamerton to be his attorney, and, the suit having subsequently been instituted, it was instituted by Mr. Hamerton as attorney for the plaintiff Casiero, and that in that suit the defendant Mr. Green applied to Mr. Richardson, another attorney, who had been in the first instance employed by the plaintiff Casiero. In fact, there appears to have been a breach of engagement by both the attorneys, who changed sides—the attorney for the defendant becoming attorney for the plaintiff, and the attorney for the plaintiff becoming the attorney for the defendant.

If the defence had amounted to a statement of the absolute truth of the libel, it would have been open to objection as embarrassing; but, possibly, would not have been the subject of a demurrer upon the ground of duplicity, though it might have been open to

be set aside as being double in its character. Here, however, it is presented to us as a defence in excuse; and falling short of alleging the absolute truth, though making the alleged libel out to be a privileged communication. And now the question for us is, whether this defence ranges within the class of conditionally privileged publications known popularly under the name of privileged communications?

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In all actions for libel or defamation (as in other cases of wrongs), the law assumes, in the first instance, that the wrongdoer has been actuated by malice. But, in reference to defamatory publications, it admits a class of defences which we know as privileged communications, and which rest on the foundation that the publication has taken place under such circumstances as rebut the inference of malice; thus the publication, not being malicious, becomes excused.

Assuming then that the matters pleaded are true—and for the purpose of considering this plea they must be taken to be true—the question in the present case is whether these matters, when pleaded in the manner in which they are pleaded, furnish a defence? The class of cases known as privileged communications is very wide and extensive indeed. But for the purposes of the present argument I may adopt the rule and the exposition of it, as propounded by Lord Campbell in *Harrison v. Bush* (a), and repeated by the same learned Judge in *Dickson v. The Earl of Wilton* (b): very valuable Nisi Prius Reports. The rule propounded in *Harrison v. Bush* was first stated in the argument at the Bar, was relied upon by the Counsel at both sides, and finally, after deliberation and conference, was adopted by the Court of Queen's Bench, and is stated in these words:—"A communication made *bona fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contain crimnatory matter which, without this privilege, would be slanderous and actionable,"

In *Dickson v. The Earl of Wilton*, Lord Campbell again says

(a) 5 El. & Bl. 348.

(b) 1 F. & F. 426.

T. T. 1863. that the law was most properly laid down in *Harrison v. Bush*.
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 GREEN. The same definition of the class of privileged communications was,
 in substance, given by the Court of Common Pleas in England, in
Somerville v. Hawkins (a), in these terms:—"But we think that

"the case falls within the class of privileged communications,
 "which is not so restricted as it was contended on the part of the
 "plaintiff. It comprehends all cases of communications made
 "bona fide, in performance of a duty, or with a fair and reasonable
 "purpose of protecting the interest of the party using the words."

From the circumstance that I in the first instance deliver my judgment, it will be seen that there is a difference of opinion in the Court; but I apprehend that, as to the rule which I have abstracted, there will be amongst the Members of the Court no difference of opinion. Our difference is as to whether the present case comes within that rule, or stands outside it? After the most careful consideration, I have come, but not without considerable doubt and hesitation, to the conclusion that the defence does not bring it within the class of privileged communications according to the rule laid down in *Harrison v. Bush*. The first observation which I make on the defence is, that, in order to fall within the rule and make the communication privileged, it must be made by a party who has an interest in so making it; or, if he has no personal interest in making it, it must be made in obedience to some duty,—which I read as meaning either a legal or moral duty. It will be observed of this defence that the defendant does not allege that he made the communication to the Law Society in consequence of any personal interest, or to procure redress for any personal grievance. It is not necessary to say whether an action for this supposed breach of the contract of retainer would have lain, or whether the defendant could have obtained other redress. Possibly, it might have been that, if he had petitioned one of the superior Courts, an order would have been made to prevent Mr. Hamerton from acting for the opposite party after he had once engaged to act for Mr. Green. But it is not necessary to say what would have happened if Mr. Green had taken the

(a) 10 C. B. 583.

proper course to procure redress for his personal wrong. Upon this defence it is obvious that he does not rest his excuse upon any attempt to obtain redress for his personal grievance, or to carry out his individual right to procure a remedy against Mr. Hamerton. The defendant disclaims that ground of excuse and rests upon another. If on the face of this defence it had been stated that Mr. Green, feeling aggrieved by the wrong done to him by Mr. Hamerton, had sought redress from the tribunal which it appeared reasonable to have had the power to give redress as for a personal wrong, the present defence would have been presented to us under a totally different aspect.

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In England the question of privileged communications arises under the general issue on the facts as proved at the trial. Our rule is different, and a wiser one, which requires the defendant, who relies on the excuse which a privileged occasion gives, to state upon the face of his defence the facts of his excuse and the ground upon which he rests it. Accordingly, the defendant hereafter stating the preliminary matter in reference to the conduct of Mr. Hamerton, goes on to state that his conduct was unprofessional and improper, and calculated to affect injuriously the character of the profession to which he belonged, and that it was *the defendant's duty as a member of society*, and as such interested, in the good conduct of the members of the profession, to bring the plaintiff's conduct under the notice of those who were also interested in the good conduct of said members, and had the power and duty of inquiry into the conduct of said members, and of preventing—the power of preventing, what?—the repetition of unprofessional conduct. I may observe that, so far from presenting a case of personal grievance, the defendant, upon the statement in his defence, seems to have acquiesced. I have already pointed out a mode in which, possibly, the defendant might have obtained redress, by preventing Mr. Hamerton from acting. But in place of following that course, the defendant, when the action was instituted by Mr. Hamerton as attorney for Cafiero, names another attorney; and a portion of the alleged grievance is that in that action, so instituted, Mr.

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Hamerton was guilty of further unprofessional conduct in procuring a common bailiff to serve the defendant. The answer given to that is, that it is no grievance; for, until our procedure shall have been altered, no attorney can safely accept an undertaking to appear and defend the action. The summons and plaint must be served in the ordinary course; and, if so, I do not know who but a common bailiff could serve it. The question then is:—Is this a privileged communication? Is any such public duty imposed on the defendant as he alleges? The conclusion to which I have come is, that no such legal or moral duty is cast upon the defendant. If the defendant had no duty, either legal or social, to constitute himself an accuser; and, if he does so, he must take care that he does not transgress the strict limits of actual truth. If he has an interest in the case, and seeks redress, that may then be an excuse. But if he does not seek redress for a personal grievance, and has no duty legal or moral cast upon him, then he is a mere volunteer, and has no protection and no excuse; and, if he exceeds the limits of truth, may be liable in an action.

It has been urged that the public had an interest in the good conduct of the profession of attorneys and solicitors. No doubt they are interested in their good conduct as persons who assist in the administration of justice, and are officers of all the superior Courts. That is perfectly true. But it is also true that the public has an interest in the good conduct of every profession—of the Bar, of doctors, and of clergymen and others. And the defendant must carry his argument to this extent, that any other member of the community might as properly have brought forward this charge as the defendant; because the duty which he alleges is one incumbent on him as a member of society,—the only difference being that the defendant had a more peculiar cognizance of all the facts. If any attorney or a barrister, a doctor of medicine, or a clergyman, is guilty of some act which is supposed to be unprofessional, does the law impose any legal or social duty upon any member of the community to become the accuser of that person; or if any person chooses to do so, is any privilege cast around him? No doubt the current of authorities, since the now

celebrated case of *Toogood v. Spyring* (a), has been to extend very much the rule with respect to privileged communications. But we have that rule limited by the case of *Harrison v. Bush*, beyond which no decision has yet gone. In respect to the case which is now before the Court, my conclusion is, that the defendant, who might, possibly, have rested his defence upon a personal interest and have sought redress for a personal grievance, does not do so. He states a personal grievance no doubt, but does not allege it as the ground of excuse in his defence, which is based upon his alleged public duty to make the communication. No such public duty is cast upon him. He may, if he thinks fit, become an accuser; but in the absence of interest or duty to become such, the law offers no special protection, and the accusation would be justified only if it be within the limit of actual truth. It might be very convenient to extend even the rule propounded in *Harrison v. Bush* by Lord Campbell; and the language which he there used indicates a disposition to carry it still further. But some limit must be put to it, and I am content to adopt the view of Coltman, J., in the case of *Coxhead v. Richards* (b), where he said:—"Yet still the duty of not slandering your neighbour "on insufficient grounds is so clear, that a violation of that duty "ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity."

I think that the present is not a case of that "great urgency and gravity" which should induce us to extend the rule beyond its just limit. The defendant has, in my opinion, failed to bring the letter in this case within the class of privileged communications: he has no sufficient excuse, because he shows neither an interest in nor a duty incumbent on him.

Another objection was taken by the plaintiff in answer to this defence—namely, that, according to the second branch of the rule relating to privileged communications, the defendant, when he put forward this complaint to the Law Society, should have shown that the Law Society was a tribunal having authority to entertain the complaint and give redress; and that he has failed to do so.

(a) 1 Cr. & Mee. & R. 181.

(b) 2 C. B. 601.

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 investigate the complaint and to give redress. The argument
 was one of great force, and was much pressed upon our attention,
 and is a very formidable one. It is not necessary however for
 me to deal with it, because the grounds of my judgment are so
 clear that the argument was well founded in support of the demurrer
 to the defence, which fails, and I am therefore of opinion that
 judgment should be given for the plaintiff.

HAYES, J.

It is for the purpose of repelling the presumption of malice
 which attaches to the publication of a writing in its character
 defamatory, that the plea of privileged communication is had
 recourse to. In the absence of all proof to the contrary, the law
 presumes that a publication of such a character has been made
 knowingly and wilfully, and with the intention of inflicting that
 injury which the publication was calculated to produce—in a
 word, that it has been done maliciously. Although a party may
 not be prepared to prove that the matters stated in his publication
 are true, and so cannot plead a justification, yet, if he can state
 facts and circumstances from which it may reasonably be inferred
 by a jury that the communication was not made in a slanderous
 spirit and for a purpose—in a word, that the party was not in-
 fluenced by malicious motives, but acted *bona fide* under a call of
 interest, or obligation of social duty,—these facts and circumstances
 will form the ground of a plea in excuse, by way of privileged
 communication. This I take to be the general principle; and in
 reasoning deductively from it we find that several rules and canons
 have been established by judicial authority, as affording illustrations
 and instances of such privileged communications. Thus it has
 been held, that when a person having an interest to protect, or a
 social duty to perform, makes the communication honestly and
bona fide in furtherance of that interest or duty, to one having a

corresponding interest or duty, he will be protected, though his communication contain defamatory matter: *Harrison v. Bush* (a). So again, it has been held, that if one having an interest to protect and secure, makes the communication honestly to one whom he, *bona fide*, though mistakeably, believes to have authority to relieve him, this also has been held to be a case of privilege: *Fairman v. Ives* (b). Many other instances might be given and cases cited to the same effect,—as, in the giving of characters to servants, words spoken by a Counsel in the course of advocacy. But all these cases are mere illustrations of the more general principle I have mentioned; and valuable as these cases undoubtedly are, yet in none of them do the Judges undertake by metes and bounds to mark out any principle of more limited area beyond which privileged communications shall not extend. Having regard then to the principle I have laid down and to the cases cited, it appears to me to be the fair result of all, that the plea demurred to does in fact disclose a sufficient ground of privilege, and, if proved to the satisfaction of a jury, would repel the presumption of malice; and that, whether we consider the person making the communication, the person of whom it was made, or the body to whom it was made, or the nature of the communication itself.

The defendant says, that having engaged the plaintiff as his attorney in an action then threatened against him, he afterwards found that, without notice to him, the plaintiff had become the attorney of his adversary; and feeling himself injured and aggrieved by what he believed to be unprofessional conduct on the part of the plaintiff, he, as a member of society, and believing it his duty so to do, wrote the letter in question—a letter which indulges in no terms of strong vituperation, but contains a simple and temperate statement of the facts which led him to the opinion he had formed, and is conversant exclusively with the grievance which the defendant says he had suffered, requesting that the case should be dealt with as it deserves. But to whom is it written? To the Law Society. A Society of attorneys and solicitors, incorporated, as the plea says, “for the general benefit

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(a) 5 El. & Bl. 344.

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(b) 5 B. & Ald. 642.

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T. T. 1863. “of the profession.” But this is not a mere voluntary Society, *Queen’s Bench* having in view only the interests of its members, however numerous or respectable. It has intrusted to it, by the Judges of the Courts of Law in Ireland, the duty of assisting them in many matters which concern the interest of the public as well as of the profession. By the 111th General Rule of all the Courts, it is provided, that in all cases of special applications to be admitted an attorney, the party shall give ten days’ notice to the Law Society of his intention. Long before the enactment of this rule the Courts were ready to avail themselves of the assistance of the Law Society. Thus, in the case of *In re M’Connell (a)*, the party had applied to be admitted an attorney, and the secretary of the Law Society petitioned the Court of Exchequer against his admission, which led to a minute inquiry into the matters of the petition; and Joy, C. B., in giving judgment, and referring to an objection made that the Law Society could not be heard, says:—
 “I do not think we would act wisely if we were to resist a fair investigation, solicited by men anxious for the respectability of their profession. Where a person thus acts, without any private motive, in a matter in which the interests of the public are concerned, it would not be the duty of the Court to stifle the inquiry. We shall not presume that the Law Society has been influenced by any improper motives.” Again, in an *Anonymous case (b)*, a person who, after having been, at his own request, struck off the roll of attorneys, was desirous to be re-admitted, was directed by the Court of Exchequer, before his case would be heard, to give notice to the Law Society. So also in another *Anonymous case (c)*, the Court of Exchequer, at the instance of the Law Society, caused two persons who had been convicted of crimes to be struck off the roll of attorneys; and, lastly, by a rule of the Benchers of the 11th January 1843, it is enacted that copies of the memorials of all persons seeking to be apprenticed to attorneys shall be lodged with the Secretary of the Law Society. What is the natural conclusion to be drawn

(a) H. & Jo. 256.

(b) 10 Ir. Law Rep. 111.

(c) Glasc. 55.

from all this? That the Benchers in the admission of apprentices, and the Courts of Law in the admission of attorneys, feeling that they have a very serious and arduous duty to discharge, have, for the public benefit, invited and encouraged the Law Society to render them their valuable assistance, by bringing before them such matters as they may think materially to affect the characters or conduct of the persons seeking admission. I believe it is not too much to say that both Bench and Benchers now look to the Law Society as the source from which information is to be conveyed to them. But from whom is the information to be obtained by the Law Society? Is it merely from other attorneys, members of the Society, stating what may have come to their own personal knowledge; or is it to be obtained from respectable persons not belonging to the profession, but who may have become acquainted with many matters touching the moral status and character of an attorney, that it much behoves the Court to be informed of; and is it not very natural that when it becomes known to the public that the Law Society is the authorised medium and organ of communication with the Court, an individual who feels himself aggrieved by the conduct of an attorney in his professional capacity should make a communication of the facts within his knowledge to the body on which he has reason to believe the Courts of Law rely for assistance and information, and through whose intervention redress is to be made or correction applied.

But it has been said, in the course of the argument, that an attorney is a private individual, who ought to be allowed to practice his profession as he may think best, and that he does not stand in the position of a public man, whose conduct is deemed a fair subject of comment by every member of society. I conceive that to be a mistake. The attorney, in the practice of his profession, is a public man. He is an officer of the public Courts of the country, and as such having certain privileges. His profession has been instituted and regulated, as well in its privileges as its liabilities, by public laws and for the public good. The good conduct of the profession, collectively and individually, is

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one of the most precious possessions of the public, and one of the best guarantees of public liberty and safety. It is to our attorney that we confide the inmost secrets of our heart, in confidence that they will not be betrayed; and it is from our attorney that we expect the advice which is to regulate our conduct in the most important concerns of life. The profession of an attorney is not then to be compared with other, the ordinary callings and avocations in life, and the laws which regulate that profession very clearly demonstrate that; for while other professions and businesses are allowed, in a great measure, to regulate themselves, very special enactments apply to the attorney. The charges for his professional labours are under the control of the Courts of Justice; he is not allowed to disclose the secrets of his client; and every serious malpractice or misconduct in his profession may be made the subject of a summary petition, not only at the instance of the person who has been the sufferer thereby, but of any member of society who can give the Court the required information which, when duly proved, may lead to the striking off the attorney from the rolls of the Court. I regard this then, as the authoritative announcement by our Courts of Justice of what I am convinced will find its response in every reflecting mind, that the welfare and good order of society is, to a great extent, bound up with the good conduct, probity, and ability of the profession of attorneys, and that every individual of the community not only serves an interest but performs a duty when he does his utmost to maintain that profession in its purity and integrity.

It is true that no case has been cited to us bearing very precisely on that now before us: but I think we have principle enough to guide us to a conclusion, and I should hold it indeed to be a very lamentable result, as well for the profession as the public, if our decision should be otherwise than what I believe it will be. It is for the best interests of the profession that every member of society, who thinks that there has been professional misconduct on the part of an attorney, should not only be at liberty freely, but feel himself under the social obligation to communicate with such a body as the Law Society, composed of the most eminent

members of the profession, who have naturally its best interests at heart, and who will be ready, by application to the Court, or otherwise as they may think most prudent, to seek for that remedy which they may think is called for by the occasion; and I am of opinion that, not only the Law Society, but the individual who, without actual malice and in all good faith, sets that Society in motion, ought to have the protection of the law for what they do, and accordingly that the demurrer to the defendant's plea should be overruled.

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I am also of opinion that the defence demurred to is good as a plea of privileged communication, and that the demurrer to it should be overruled. The statements in the defence (which on the argument of the demurrer are to be assumed as true) substantially sustain those in the letter complained of, with this exception, that the letter states that defendant had engaged plaintiff to act as attorney for him in an action *then* pending, and which had been previously brought against defendant; whereas, from the statements in the defence, it appears that the action had not been brought at the time of such retainer, but that the defendant having been applied to for payment of the demand before action brought, retained the plaintiff, who agreed to act for him as attorney in any action that might be brought in respect of such demand. It further appears, from the defence, that notwithstanding such retainer the plaintiff, without any notice to defendant, changed his mind, and was himself the attorney who brought the action against defendant, and caused him to be served with the writ in a manner which the defendant considered offensive. The variance to which I have referred between the statements in the defence and those in the letter, would be a ground for holding that the defence could not be sustained as a plea of *justification*; but that variance does not, in my opinion, affect the validity of the defence as a plea of privileged communication. I think that, even upon the facts stated in the defence, defendant had just reason to feel aggrieved by plaintiff's conduct, and to consider it (as he stated in his defence) to have been unpro-

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fessional and improper, and calculated to affect injuriously the character of the attorney profession.

The defence also states that it was "*defendant's duty, as a member of society, and as such interested in the good conduct of the members of said profession,*" to bring plaintiff's conduct under the notice of those who were also interested in the good conduct of said members, and had the power and duty of preventing the repetition of improper or unprofessional conduct on the part of said members; and, further, that the Incorporated Society of Attorneys was a Society composed of the leading members of said profession, and had been incorporated for the general benefit of said profession; and that defendant believed that said Society had full power, and that it was their duty to make inquiry into the conduct of members of said profession, and to prevent the repetition of improper or unprofessional conduct on the part of any of such members. The defence then states that defendant wrote and published said letter, being a privileged communication, and on a lawful occasion, and that he did so in good faith, and without malice, and believing the statements contained in such communication to be true in substance and in fact.

It is true that, by the terms of this defence, the defendant rests his "case of privilege on the ground of a *social duty on his part as a member of society,*" without expressly relying on the circumstance that he was himself the party personally aggrieved by the conduct of which he complained; but, if the fact of his being the person aggrieved would (with the other facts appearing on the defence) raise a case of privilege upon another ground, different from that which he has in terms put forward, it appears to me that we should give him the benefit of that other ground, though he has not in terms rested his privilege upon it. In the case of *Bell v. Parke* (a) there are some observations of Chief Baron Pigot as to the mode in which it is necessary to frame a plea of privileged communication, with reference to the grounds that might be relied on as raising the privilege. In the argument of that case, the defendant's Counsel sought to sustain the plea

(a) 10 Ir. Com. Law Rep. 288.

of privilege, on the ground that the slanderous communication complained of was made by him in the discharge of a *duty* existing on his part, and with the intention of performing that duty; but the defence contained no averment that the communication was made with such intention. The Chief Baron however stated his opinion to the effect that such an averment was not necessary; and that, though it was not made in the defence, the Court should treat the communication as privileged, if the facts stated in the defence showed that the duty to make the communication existed, and that the making of it corresponded with such duty, and took place on an occasion calling for the exercise of that duty. It appears to me that the principle of the rule so laid down by the Chief Baron is applicable to the case now before us; and that, if the facts stated on the defence are such as to render the letter privileged, though upon a different ground from that of performing the social duty on which defendant relies, we should hold the defence a good one.

Several authorities have been cited to show what circumstances would render a communication privileged; and I think that, upon reference to some of them, and to the principles therein laid down, it will appear that there are facts stated in the present defence which (independent of the existence of any such public or social duty on defendant's part, as has been relied on by my Brother HAYES) are sufficient to render the letter in question a privileged communication upon the ground that the defendant (having just reason to complain of the unprofessional and improper conduct which plaintiff acting as an attorney had adopted towards him, in a matter where the defendant's personal interests were concerned) made that complaint to an Incorporated Society, which was composed of the leading members of that profession, and which had been instituted for the general benefit of such profession; and that defendant made such complaint under the belief (which was I think a reasonable belief) that the Incorporated Society had full power, and that it was their duty to inquire into such conduct, and to prevent the repetition of it. It is true that defendant does not by his letter claim any specific redress (even supposing that the Society had power to award him any), but states that he laid the case before them, "trusting that

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One of the cases to which I have referred is that of *Toogood v. Spyring* (a), which appears to me an authority in support of the present plea. In that case, according to the rule of pleading in England, the defence of privilege was not relied on (as here) by a special plea, but was raised at the trial upon the facts there proved. It appeared that plaintiff, who was a journeyman carpenter in the employment of Brinsdon (a master carpenter), had executed some work in defendant's house, and that the work was negligently and badly done. The purport of the alleged slanderous words was a charge that plaintiff, while executing such work, had broken open defendant's cellar-door, got drunk, and spoiled the job. It appeared also that the defendant had spoken the words complained of on three several occasions—first, to plaintiff himself, in the presence of one Taylor; secondly, to Taylor, in plaintiff's absence; and, thirdly, to Brinsdon, which was also in plaintiff's absence; and that afterwards, on an investigation by Brinsdon, in the presence of plaintiff and defendant, the fact of the door having been broken open at all was not proved; and that Brinsdon thereupon told plaintiff that the charge against him was not made out, and that his character was cleared. Upon a motion for a new trial, the Court held that, although the statement made by defendant to Taylor, in plaintiff's absence, was not privileged, yet that both the statements made to plaintiff in Taylor's presence, and also that made to Brinsdon (though in plaintiff's absence), would have been privileged if made fairly and honestly, and without malice. It did not appear in that case that the defendant, in making either of those two statements, which were held to be privileged, required or expected to obtain thereby any redress or remedy for plaintiff's alleged misconduct, or that the Court considered such circumstances as affecting the question of the existence of the privilege. Baron Parke, in delivering the judgment of the Court, after referring (p. 193) to the general

(a) 1 C. M. & R. 181.

rule, that the publication of statements false in fact, and injurious to the character of another, was considered as a malicious publication, for which an action lay, goes on to except from that general rule, not merely statements "fairly made by a person in the discharge of some public or private duty, whether legal or moral," but also statements fairly made by a person "in the conduct of his own affairs, in matters where his interest is concerned." And he then adds:—"In such cases the occasion prevents the inference of malice which the law draws from unauthorised communications, and affords a qualified defence, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restrained the right to make them within any narrow limits." In a subsequent part of his judgment (referring to the instance of a statement made by a master in giving the character of a discharged servant), he says that, "if made with honesty of purpose to a party who has *any interest in the inquiry* (*and that has been very liberally construed*)," the fact of there having been some casual bystander could not alter the nature of the transaction. And again (p. 194), with reference to the case then before the Court, he states that "the defendant stood in such a relation to the plaintiff, though not strictly that of master, as to authorise him to impute blame to him, provided it was done fairly and honestly, for any *supposed* misconduct in the course of his employment." I think that several of these observations of Baron Parke bear materially upon the case now before us. It appears upon the facts as stated in the defence that, while the relation, not indeed of "*servant and master*," but of attorney and client, subsisted between the parties, the plaintiff as an attorney acted towards defendant in an unprofessional manner, inconsistent with his duty as such attorney; and that the complaint made by defendant was made in relation to "the conduct of his own affairs, and in matters where his interests were concerned;" and, as it also appears upon the defence that the Incorporated Society was composed of the leading members of the attorney profession, and had

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been incorporated for the general benefit of that profession, I think it may fairly be held that the defendant, in making his complaint to that Society, made it to a body having such an interest in respect of the misconduct complained of as would render the communication privileged. The rule as to what constitutes such an interest should, according to Baron Parke's observations, be "*very liberally construed*;" and it would be manifestly for the general credit and interest of the profession, for whose benefit that Society had been incorporated, that there should be such an inquiry and expression of opinion by the Society, respecting the misconduct complained of, as would probably prevent a repetition of it.

Plaintiff's Counsel have, however, relied (amongst others) on the more recent case of *Harrison v. Bush* (a) as laying down a general rule upon the subject, showing what circumstances are required to render a communication privileged. The rule relied on is stated in the judgment of the Court, as delivered by Lord Campbell (p. 348), in the following terms:—"A communication made *bona fide* upon "any subject-matter in which the party communicating has an "interest, or in reference to which he has a duty, is privileged "if made to a person having a corresponding interest or duty, "although it contain criminary matter which, without this privilege, would be slanderous and actionable." Now I do not think in stating that rule the Court is to be understood as having intended to enumerate *all* the cases in which a communication could be held privileged, or as having laid down that no communication would be privileged except such as came within the terms stated. In that case of *Harrison v. Bush*, the libel complained of was a memorial to the Secretary of State, complaining of the conduct of plaintiff as a magistrate, and praying for his removal; and the Court held that the memorial, having been presented *bona fide*, was a privileged communication, on the ground that although the Secretary of State had not himself the power to remove a magistrate, he might have caused inquiry to be made into the matter complained of, and communicated on the subject with the Lord Chancellor, who had such power. It appears from Lord Campbell's judgment that, in the argument of that case before the Court, it had been conceded by

(a) 5 El. & Bl. 344.

the plaintiff's Counsel that a communication coming within the limits of the above rule would be privileged; and it was sufficient for the Court, in support of their judgment, to show that the communication before them came within those limits, without deciding that the defence of privilege would not extend beyond them. It will also be found that Lord Campbell, in subsequent parts of his judgment, refers to and recognises the authority of some previous cases in which the communication was held privileged, though made under circumstances different from those stated in that rule, and that he does not profess to confine the defence of privilege within narrower limits than were allowed by those previous cases. He refers (page 357) to the case of *Cleaver v. Sarrande*, as having been recognised by Holroyd, J. (in his judgment in *Fairman v. Ives*), and which, as Lord Campbell stated, "carried considerably "further the doctrine of the occasion repelling the presumption of "malice." That case of *Cleaver v. Sarrande* was cited by Justice Holroyd, in his judgment in *Fairman v. Ives* (a), as deciding "that no action was maintainable for matter contained in a written "communication made *bona fide* to a friend, and not for the purpose "of slandering." I may also refer to part of Justice Best's judgment, in *Fairman v. Ives*, in which (in reference to the case before him) he says:—"The defendant seems to have felt that the plaintiff "had treated him very ill; and the letter contains such expressions "as an angry man was likely to use, and such as would have rendered the letter a libel if it had been sent into general circulation, "or to any individual, without a sufficient cause to justify the "sending of it." It is true that the circumstances under which the communications were made in those two last-mentioned cases, and in others relied on by Lord Campbell, were different from those now before us; but the decisions themselves, and the opinions expressed by the Judges in them, show that the defence of privilege is not confined within the limits contended for by plaintiff's Counsel. With respect to another case of *Blagg v. Sturt* (a), which was relied on by plaintiff's Counsel, and in which it was decided that a memorial, also addressed to a Secretary of State, was not privileged, because he had no direct authority in respect of the

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matter complained of, and was not a competent tribunal to receive the application, that decision was overruled by the case of *Harrison v. Bush*; and Lord Campbell, in reference to it, states, in his judgment (page 355), that there were various instances in the books in which privilege had been allowed to criminatory publications, although those to whom they were addressed "*had no direct authority in respect of the matter complained of.*"

Lord Campbell also, in his judgment (p. 349), referring to the rule so laid down, states that the word "duty" in it "cannot be "confined to legal duties, which may be enforced by indictment, "action or *mandamus*, but must include moral and social duties "of imperfect obligation." Now, in the case before us, may it not be said, with respect to the Incorporated Society, instituted for the general benefit of the attorney profession, that there was *some* moral or social duty on their part, "though of imperfect obligation," to institute an inquiry into the misconduct complained of (the frequent repetition of which would certainly be injurious to the character of that profession for whose benefit the Society had been incorporated), and to endeavour, by the expression of their opinion or otherwise, to prevent such repetition, although they had not themselves any legal power to award punishment or redress? In some of the cases referred to by my Brother HAYES, the Courts appear to have recognised as well the right of the Society, under certain circumstances, to intervene, with respect to the conduct and character of members of that profession, as also their interest in the matters; and these cases would show that on the facts stated in the present defence, some proceeding on the part of the Society as would probably have the effect of preventing a repetition of it would be properly in accordance with the objects for which they had been instituted, and would not be altogether out of their power.

Upon the whole of the case, I am accordingly of opinion that, even supposing defendant was not privileged to make the complaint he has done, upon the ground of such public or social duty as relied on by my Brother HAYES, still that defendant had a sufficient *interest* in the matter of the complaint as to sustain

(a) 10 Q. B. 899.

so far his plea of privilege; and, with respect to the other question, whether the Incorporated Society was a body to whom his complaint might properly be made, so as to render it privileged, I am also of opinion, having regard to the authorities on the subject, and particularly to the foregoing observations of Baron Parke and Lord Campbell, as to the liberal construction to be put upon the words "*interest and duty*," in considering such a question, that the Incorporated Society, instituted for the purposes already stated, had such a concern in the matter of the complaint, either in respect of "*interest or duty*," as rendered the communication privileged.

It has been urged that the extension of the defence of privilege to cases like the present would be an encouragement to the wanton or malicious publication of slanderous and unfounded statements. I do not however think any such result would follow. It appears to me, upon the very peculiar facts stated in the defence, that the complaint in question was not wantonly made, but was (to use the words of Baron Parke) "fairly warranted by a reasonable occasion." The defence also states that the complaint was made "in good faith, and without malice;" and, for the purposes of our present decision, the truth of that statement is to be assumed. A similar statement should be contained in all pleas of privileged communication; and if, upon the trial before a jury of the truth of the plea, they should find that such statement was untrue, and that the communication complained of was maliciously made, then the defence of privilege would not avail; and it would be for the jury to award competent damages against the defendant for his slanderous publications.

LEFROY, C. J.

In this case I will endeavour to express, shortly, the different views which have presented themselves to me upon this case, on which I have come to the conclusion that the defendant is upon this record entitled to our judgment, not upon the strength of his own defence, but because, upon the whole record taken together, the plaintiff appears disentitled to our judgment; and the general rule of law is, that if the plaintiff fail to establish his case in point of law and fact, the judgment must be given against him, and the defendant will not be put to establish his defence. It

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is not therefore necessary for me to express any definite opinion upon this defence of "privileged communication," which has been so much discussed; but I think it becoming to state the difficulties which occur to me in saying that it has been made out, although it appears to some Members of the Court to be established. I admit it is stated, that the Law Society has been incorporated by royal charter, for the general benefit of the profession of attorneys and solicitors; but we have not any more of the charter set out. There is no allegation that, either by the common law or by statute, this Society has the right and power to give redress in cases of this sort, in which one member of the body has violated his duty, and done an act calculated to bring disgrace upon the profession. There is nothing then, no allegation on the pleadings—no statement of any sort to show that, either by statute, or the common law, or by the charter, the Law Society had this power of giving redress, which is alleged to have been the object with which this application by the defendant was made to them; nor is there even an allegation in the abstract that they had in any way a power of giving redress to the party who applied to them, who justifies his publication of this charge upon the ground that he *bona fide* believed that they had that power. It is not enough for the defendant to allege that he had a *bona fide* belief; for how can an issue be taken upon a man's belief, when he does not give his reasons for entertaining that belief, or state the facts (if any) on which it is grounded? If he stated in this defence, even in general terms, that they had the authority to give redress, I could understand the case. But the fact that he rests his defence solely upon the *bona fide* belief that they had such power and authority, I confess, is a stumbling-block in my way towards assenting to the view which some of my Brothers have taken of this case. I do not think that we can import into it the circumstance of the various occasions upon which the Superior Courts have shown the implicit confidence we placed in this body, when they are called upon to certify to the character of a party who seeks to be admitted an attorney under usual circumstances, or any other occasion of that sort. I do not see how we are to import anything of that sort into the case, though we admit the fact that there

was a charter. It is hard to conceive a charter of the Crown incorporating a body, and communicating to that body powers of inflicting punishment, or even reproof in the way of penalty, and giving a species of criminal or reformatory jurisdiction by their charter. All the reformatory institutions of the country have been established by legislative authority. I must therefore say that, under these circumstances, I should feel great difficulty in holding this to be a valid defence, and should be disposed to say, were I to express my opinion, that it does not come within the principle or analogy of the cases which have been cited; but whatever doubt I might have upon the validity of the defence, I have none whatever in coming to the conclusion upon the record as it now stands before us,—that we cannot give judgment for the plaintiff. See how the matter stands:—The defendant states his defence to this effect;—"I retained the plaintiff, and "he was acting as my attorney in the suit instituted against me, "and therefore came to the knowledge of all that was important "for my defence that my attorney should know, and being in that "position he went over to my adversary with all the information "which related to my defence." The plea states all this; what course then has the plaintiff taken? Instead of coming to the Court, for leave to demur and reply, and thus having an opportunity of denying the charge against him (if he could do so), he demurs simply, and thereby admits the fact that he, an attorney engaged for the defendant, and in possession of all the secrets of his case, went over to his adversary and acted for that adversary, against his original client. I say that supposing that defence to be proved in the terms of it, and the demurrer admits the truth of the charge, and if the charge be not false it cannot be malicious; but further, when the plaintiff admits of record that the charge, which is the sting of the libel, is true, what becomes of his right to recover damages in this action? This is the ground upon which I have come to the conclusion, we must give judgment for the defendant.*

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* The following are the most important cases on privileged communication decided since *Hamerton v. Green*:—*Whitely v. Adams* (15 C. B. 392), where two letters were held privileged,—one on the ground of duty, as written by one clergy-

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man to another touching the character of A, one of the parishioners of the recipient; the other on the ground of interest, as written to B, a third party, likely to show it to A, who had in the meantime taken an action for the first letter. A having employed B, on the recommendation of C, dismissed B, and wrote the alleged libel to C.—*held*, that if a privilege existed, the language of this particular letter was in excess of it. *Kinnersley v. Fryer* (15 C. B. 422):—A having accused B privately of larceny, B threatened proceedings. A asked D if D could not give evidence of the larceny—*held*, privileged. E heard of the charge from B, and asked A if he had made it, when A admitted it—*held*, not privileged: *Force v. Warren* (15 C. B. 806). As to privilege in giving character of discharged servant, and evidence to rebut presumption of privilege, see *Jackson v. Hopper-ton* (16 C. B. 840). Action against coroner for words spoken in discharge of his duty; *Thomas v. Churton* (2 B. & Sm. 475). Defamation of articles manufactured by the plaintiff; *Young v. Macrae* (3 B. & Sm. 364). Fair comment in a newspaper; *Campbell v. Spottiswoode* (3 B. & Sm. 769). Compare with the second point in *Whitely v. Adams*, *Sayer v. Begg* (15 Ir. Com. Law Rep. 459). See also *Parkins v. Scott* (1 H. & C. 153); *Blake v. Steven* (11 L. T., N. S., 543); *Halloran v. Thompson* (14 Ir. Com. Law Rep. 334); *Fox v. Broderick* (14 Ir. Com. Law Rep. 453).

May 28.
June 1, 3, 4,
27.

In re WILLIAM CONNOR an Infant.

Habeas corpus. The parties to whom a writ of *habeas corpus*, sued out by the father of a male infant, was addressed, returned that the infant at the time of the issuing of the writ was over fourteen years of age and under sixteen.

HABEAS CORPUS.—On the 28th of May, the Court, on the application of the father of William Connor, granted a writ of *habeas corpus*, which was directed to the matron and other authorities of an institution called the “Bird’s Nest,” at Kingstown. The writ commanded the parties to bring up the body on the 1st of June; and was granted upon the affidavit of the boy’s father, who stated that the boy was about the age of thirteen years and six months.

Accordingly, on the 1st of June, the writ was obeyed; but, *Acheson Henderson*, of Counsel with the parties to whom the

Held (*dissentiente* O’BRIEN, J.), that the father’s application must be refused, inasmuch as at the age of fourteen a male infant is at liberty to exercise a discretion as to his own place of abode.

Held, by O’BRIEN, J.—That the guardianship of the father is more extensive than that of the mother.

That the *guardianship by nature* is not now limited to the eldest son, but extends to all the children alike.

That though the *guardianship by nurture* terminates at the age of fourteen in all cases, that of the father *by nature* continues till twenty-one.

That infants of both sexes may choose their place of residence at the age of discretion.

That the age of discretion for males and females is sixteen years of age.

Regina v. Howes discussed.

writ was directed, moved that the time for making the return be extended until the 4th day of June, in order that his client might have time enough to spread out on the return facts which would show that the boy was upwards of fourteen years of age. We do not mean to show cause against the writ.—[FITZGERALD, J. Unless you show cause you cannot introduce those facts into the return.]

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J. A. Curran, jun., on behalf of the boy's father, contended that, as the boy was in Court and cause was not to be shown, a return that the boy was in Court should at once be made.

A. Henderson read the baptismal certificate, which stated that William Connor was baptised on the 8th day of May 1849, and had been born on the 28th day of April 1849. These facts will displace the statements in the father's affidavit.

J. A. Curran, jun., submitted that this application should be made on affidavit: *Rex v. Clarke (a)*.—[HAYES, J. I do not understand the application of that case to the present one; because that was the case of an excuse for not bringing up the body at all. But here the intention is to make a *paratum habuit* and add to the return the fact that the boy is over fourteen years of age.

Per Curiam.—Let this case stand until the day after to-morrow.

Hemphill (with *A. Henderson*) contended that the boy must be set free, as the return showed that he was fourteen years of age, and was therefore at liberty to elect where he would abide. The Court must follow the course which was adopted in the case of *In re Patrick Shanahan (b)*.

June 3.

J. A. Curran, jun., for the boy's father, admitted that it could not any longer be disputed that the boy was over fourteen years of age, but submitted that the age of discretion was, not fourteen, but sixteen years. He requested time to prepare himself to argue that question.

It was then agreed that the return, which was very long, should be considered as simply amounting to *paratum habeo*; and that, on the day following, the Counsel should argue the

June 4.

(a) 3 Burr. 1362.
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(b) 5 Ir. Jur. 58.
15 L

T. T. 1863. single question, whether fourteen years was for male children the age of discretion?

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J. A. Curran, jun., submitted that, as it appeared on the face of the return that the boy was under sixteen years of age, he should be delivered up to his father. In the case of *In re Shanahan (a)* there is not one word about the age of the boy being only fourteen. From the arguments, on the contrary, it appears that he was seventeen years of age, so that that case does not rule the present. There are several descriptions of guardianship: guardianship by nurture which ends at fourteen years; and guardianship by nature of the eldest son, which does not terminate until twenty-one years. The *King v. Thorp (b)*. The 12 *Car.* 2, c. 24 (*Ir.*), s. 8, gave to the father the guardianship by nature over all his children. That Act gave power to appoint testamentary guardians of his children till they reach the age of twenty-one years; and the law never would have given him power to delegate to others an authority which he himself had not: *Wellesley v. Wellesley (c)*. Later cases have decided that, although the father is entitled to retain the custody of his sons till twenty-one, yet, if they have attained the age of discretion, the Court will not control the boy's choice: *The King v. Greenhill (d)*. What then is the age of discretion? In all the late cases it has been taken for granted that fourteen years was the age of discretion; but, in all of them, except *In re Darcys infants (e)*, the application was made at the instance of the mother, and the children were all under fourteen years. In *The Queen v. Howes (f)* the child was over fifteen years, and under sixteen. Now it has always been held that females attain the age of discretion before males. That case at all events shows that the father is guardian by nature.

Counsel also cited 2 *Kent's Commentaries*, p. 193; *The Queen v. Clarke (g)*.

(a) 5 *Ir. Jur.* 58.

(b) *Carthrew*, 186.

(c) 2 *Bligh*, N. S. 145.

(d) 4 *Ad. & El.* 640.

(e) 11 *Ir. Com. Law Rep.* 298.

(f) 30 *Law Jour.*, N. S., Mat. Cas. 47; S. C., 7 *Jur.*, N. S., 22.

(g) 7 *El. & Bl.* 186.

Hemphill and *Acheson Henderson*, contra.

The boy must be allowed to go where he pleases; that is the right of every person who, having reached the age of discretion, is kept in illegal custody. When infants reach the age of fourteen years, they are *capaces doli*; and that is the age of discretion: *Co. Lit.*, 88 *b*, notes 12, 13; 1 *Hale's Pleas Cr.*, p. 25. In the case of *In re Moore* (a) it was assumed apparently in the judgment of O'BRIEN, J. (page 22) that fourteen years was the age of discretion. The Court cannot grant this motion without overruling *In re Shanahan* (b). That case was argued on the assumption that fourteen years was the legal age of discretion.—[FITZGERALD, J. In that case the real contention on the part of the prosecutors was that, considering the physical infirmities of the boy, he could not be deemed capable of exercising discretion. But, upon examination of him, it turned out that he was a most intelligent boy, and capable of giving written answers to questions.]—The argument for the prosecutor here is inconsistent with the case of *The Queen v. Greenhill* (c); for their argument is that, until a son attains twenty-one years, this Court must bind him over to his father *ex debito justitiæ*. *The Queen v. Clarke* (d) went further than any other in favour of the prosecutor here, because, for the first time, it was there decided that up to fourteen years there was no discretion. But, from the beginning to the end of that case, it was assumed that the right to the custody only continued until fourteen years. An apparent exception has been introduced by the case of *Ex parte Barford* (e), without the aid of which the present prosecutor could not argue this case, since the decision in *The Queen v. Clarke*. In *Ex parte Barford* it would have been a mercy to have given up the girl to the father, if it had been possible for the Court to do so. But the decision in that case is confined to the case of a female, and to the analogy afforded by criminal statutes, which does not apply to males at all. In *Regina v. Simmins* (f) the decision was also founded on

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(a) 11 Ir. Com. Law Rep. 1.

(b) 5 Ir. Jur. 58.

(c) 4 Ad. & El. 624.

(d) 7 El. & Bl. 186.

(e) 8 Cox's Crim. Cas. 405.

(f) 8 Cox's Crim. Cas. 401.

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the criminal statutes applicable to females. The opinion of Sir J. Patteson was not propounded from the Bench, but was written with reference to a boy who was only twelve years old; so that it cannot possibly alter the law.—[O'BRIEN, J. But it is relied upon by Cockburne, C. J., in *Barford's case*, which is reported *sub nom. The Queen v. Howes (a)*. The view of the Profession as to that decision, and what it established, is stated in a *note* at the end of the report of *Re Elizabeth Daly (b)*.

Counsel also cited *Com. Dig.*, tit. *Guardian*, let. *D*, and *Hyde v. Hyde (c)*.—[FITZGERALD, J. No doubt the *dicta* are as you say. But is there any case which formally decides that a father is not entitled to the custody of a son who is between fourteen and sixteen years of age?—No.—[O'BRIEN, J. Is there any provision in the Divorce Act—I speak with reference to the case of *Hyde v. Hyde*—which enables the Judge to deal with the children? The Court of Chancery has a jurisdiction which is much more extensive than that which belongs to Courts of Common Law, and acts upon principles which *we* cannot take into consideration at all. The Court of Divorce, being a tribunal newly created, must have, in *Hyde v. Hyde*, acted under a special authority conferred by the Divorce Act, and similar to that which is exercised by the Court of Chancery, namely, without reference to legal principles, a power of deciding what is, upon equitable principles, best for the child.]

J. A. Curran, jun., in reply.

The question is not, at what age guardianship by nurture ceases? but, at what age the child has attained a discretion sufficient to enable it to set its father's authority at defiance? *The Queen v. Clarke* has been overruled by *The Queen v. Howes*, in which the Judges argued from the analogy of the criminal statutes, and so took the case entirely out of the question of guardianship by nurture. It would be wrong to compel a father to support his son who can yet set him at defiance. But, if this boy is not now delivered up to his father, such will be the result under the 1 & 2

(a) 30 Law Jour., N. S., Mat. Cas. 48. (b) 2 F. & F. 263.

(c) 29 Law Jour., N. S., Prob. Mat. & Adm. Cas. 150.

Vic., c. 56, s. 53.—[HAYES, J. That statute goes rather too far for you, for it relates also to illegitimate children.]

Cur. adv. vult.

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On a subsequent day the boy William Connor was examined in Chamber, before the LORD CHIEF JUSTICE, O'BRIEN, J., and the Clerk of the Crown, and on this day the Court delivered judgment.

June 27.

FITZGERALD, J.

This case of William Connor came before the Court on the 4th of June 1863, on the return to a writ of *habeas corpus*. That writ had been sued out by the father of the boy William Connor, and was directed to the principals of an orphanage at Kingstown, which is known as "*The Bird's Nest*." The return is rather voluminous, and contains a good deal of irrelevant matter; but on the argument it was arranged that the return should be taken as one of "*paratum habeo*" simply; and the Court, according to the course of its practice, is called upon to see, in the first instance, that the boy is relieved from illegal restraint: so far, there is no difficulty. But the father now requires us to deliver the boy into his custody. It appears that the boy attained the age of fourteen years in the month of April last, and was, consequently, more than fourteen years old at the time when the writ was sued out; and the question which is now before us is, whether, at the instance of the boy's father, we should make an order that the boy, who is now over fourteen years of age, shall be delivered up to his father?

The rule in cases in which infants are brought before the Court by writs of *habeas corpus* is to a certain extent settled by the case of *The King v. Greenhill* (a); to which case I refer because it contains not alone a very lucid judgment, but also a reference to all the earlier cases of any importance. Lord Denman there said:—"When an infant is brought before the Court by *habeas corpus*, "if he be of an age to exercise a choice, the Court leaves him "to elect where he will go." But the question remains for us to determine, whether this boy William Connor has attained the

(a) 4 Ad. & El. 640.

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age of discretion? that is to say, what is the age at which the Court will assume that the boy is capable of exercising a choice as to his place of abode? As a general rule, this question must be answered without reference to the maturity of intellect, or to the precocity of the infant, and without regard to the consequences. The prior cases are all collected and commented upon in that case of *The King v. Greenhill*; and it is somewhat remarkable that, though cases are of very frequent occurrence in which infants have been brought up by *habeas corpus*, yet there is no case in which a decision has been made with reference to the paternal right to the custody of a son who is over fourteen years of age. With regard to male infants *under* that age, the decisions are numerous; but there is no decision on the point with respect to a boy who had attained the age of fourteen years.

In the course of the discussion in the present case, it appeared that the real question was whether, in the case of an application made by the father, the boy is to be assumed to have attained discretion at the age of fourteen years; *or*, whether that assumption is to be postponed until he shall have reached the age of sixteen years? From a recent decision it appears that sixteen years is the age of discretion in the case of female infants. Here, however, the question is to be determined as between a father and his son.

The prosecutor relies very strongly on the 14 & 15 *Car.* 2, c. 19 (*Ir.*), s. 6. That is a statute which, altering the Court of Wards and Liveries, by its sixth section enables a father to appoint by deed or will a guardian of his infant children within the age of twenty-one years; and it was argued that, inasmuch as the father had a right under that statute to appoint a guardian for his infant son until he attains the age of twenty-one years, who, it was alleged, would be entitled to the care and custody of the boy until he attains that age, therefore *a fortiori* the *father* is entitled to the custody of his son until he reaches his full age of twenty-one years. That was the broad position which was contended for by the prosecutor; but it is not necessary for us to pronounce any opinion as to the limit of the father's right to appoint a guardian under that statute, or as to the extent of the right of the guardian, when appointed, to the

custody of the ward. The question is, whether we should now, upon a return made to a writ of *habeas corpus*, make an order delivering this boy into the custody of his father?

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The prosecutor also relied upon a portion of the judgment in the case of *The Queen v. Clarke (a)*. But there was not any decision upon the point which we have now to determine in that case, because it related to the custody of a daughter, not of a son, and moreover to the custody of a daughter who was under fourteen years of age. In the course of Lord Campbell's judgment in that case, reference is made to an opinion of Sir John Patteson. Sir Erskine Perry, an Indian Judge, and who had been a pupil of Sir John Patteson, put in force a writ of *habeas corpus* to restore a Hindoo boy of twelve years of age, who had embraced Christianity, to his father, who adhered to the Hindoo religion; and subsequently wrote to Sir J. Patteson, who was then a retired Judge, asking his opinion on the subject. The opinion of Sir J. Patteson was afterwards published, in a *note* to *Sir E. Perry's Oriental Cases*. It was the opinion of a learned person who had ceased to hold a position on the Bench. Sir J. Patteson, in his reply to Sir Erskine Perry, said:—"I cannot doubt that you were "quite right in holding that the father was entitled to the custody "of his child, and enforcing it by writ of *habeas corpus*. *The "general law is clearly so, and even after the age of fourteen; "whereas this boy was only twelve.*" The weight to be given to that opinion is enhanced by the circumstance that it was quoted by Lord Campbell without disapproval; but, whatever its value may be, it cannot be considered a decision.

The prosecutor also relied strongly on the case of *The Queen v. Howes (b)*. In that case also the question arose as to the right of the father to the possession of his daughter, who was over fifteen, but under sixteen years of age. The decision of the Court was, that the girl, though she was over fifteen and under sixteen years of age, had not attained the age of discretion, and that her father was entitled to the custody of her. But that decision is based upon

(a) 7 El. & Bl. 186.

(b) 7 Jur., N. S. 22: S. C., 30 Law Jour., N. S. 47.

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the provisions of the statute 4 & 5 *P. & M.*, c. 8, and the 9 *G.* 4, c. 31, s. 20. Both those Acts make the abduction of a girl, who is under sixteen years of age, a misdemeanor. Guided by the analogy of those Acts, the Court of Queen's Bench in England held that in substance their effect was to take away from a girl all discretion as to her place of abode until she reached the age of sixteen years, and to give to the parents or guardian the right to fix her place of residence; and in that particular case the Court decided that, so far as related to choosing a place of residence, the girl had not attained the age of discretion, and that her father was entitled to choose it for her.

But it has been urged upon us that, although the decision only related to the case of a daughter, the language of Cockburne, C. J., was general, and would include the case of a boy; and that the Court had not arrived at their decision without consulting the other Judges in England. The judgment of the Chief Justice does contain general language from which it might be inferred that the Court intended to go beyond the case of a daughter, and used general language, with an intention to establish a general rule applicable to boys as well as to girls. If the Judges of the Court of Queen's Bench in England had, upon consultation with the other Judges, come to the conclusion that it was proper to fix one general rule applicable to boys as well as to girls, and that sixteen years should be the age of discretion in both instances, I, for one, would have been content, and would deem it very mischievous if, after they had so decided, we were now to come to a different conclusion. That there should be one rule in England and another in this country, would be fraught with mischief. The general language used in the judgment in *The Queen v. Howes* is no doubt ambiguous, and open to the criticism and observations which were made at the Bar; but we can do no more than endeavour to deduce from the reports what was intended to be laid down. The decision in that case was simply upon the parental right to the custody of a daughter; and I have been unable to satisfy my mind that the Court intended to lay down a rule more extensive than was called for by the point decided (p. 21). And I can well see strong reasons why

such a rule as there laid down should be applicable to the case of girls; and how fraught with danger it would be if a person might with immunity take away from the custody of her parents a girl above fourteen and under sixteen years of age, probably with the intention of working out her utter and entire ruin. Both those statutes which I have mentioned were passed with the intention of providing against so great an evil; and, as between parents and daughter, the result of both is to deprive the daughter of all discretion as to her residence while she is under the age of sixteen years. Both statutes are founded upon the wisest rules, and were intended to prevent a great and growing evil, but are inapplicable to a son. Therefore, that case of *The Queen v. Howes* is not a decision extending beyond the case of a daughter; and it only establishes that, as between a father and his daughter, the period of discretion does not arrive to the daughter until she is sixteen years old.

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There is no express decision as between father and son fixing definitely the period at which the son should be assumed to have reached the age of discretion, and we have now to endeavour to arrive at some rule on the subject, guided by the current of judicial and professional opinion, and by the legal analogies to which I shall now refer.

At common law, and independently of any statutable provision, a boy might be the subject of three descriptions of guardianship. In the first instance, the paternal guardianship by nature, which arose only in case of an eldest son, and continued until he became of age. It had peculiar characteristics, and was founded on particular reasons to which I need not refer.

The second species of guardianship was that for nurture; it lasted until the boy reached the age of fourteen years. The third species was guardianship by socage, which belonged to the next-of-kin not capable of succeeding to the socage tenement; and it also expired at the age of fourteen years.

Again, at common law a boy at fourteen years of age was assumed to have attained the age of discretion, and was for all the purposes of the criminal law responsible for his own acts. Up

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to the age of seven years it was deemed that a boy was absolutely incapable of distinguishing between right and wrong. Between the ages of seven and fourteen years, it was matter for inquiry, whether a boy was capable of distinguishing between right and wrong? There were some crimes of which up to the age of fourteen years he was deemed absolutely incapable—for instance, of rape, or even of an attempt to commit it. But after that age he was deemed capable, and was responsible for his acts. Up to the age of fourteen a boy was incompetent to make a will, but on attaining that age he was capable of making a testamentary disposition of chattels. So far therefore as we can be guided by analogy, the law seems to have assumed that at fourteen years a boy had attained the age of discretion.

There are also some statutable analogies which may guide us in deciding this case. For instance, the statute 10 *Car.* 1 (Ireland), sess. 3, c. 17, which was in substance a re-enactment of the 4 & 5 *P. & M.*, c. 8, in England, made the abduction of an unmarried girl under sixteen years of age a crime, irrespective of her consent. The second section of that statute is very remarkable. It enacts—
 “That if any person or persons *above the age of fourteen years* shall, from and after the 1st day of May next ensuing after the end of this present session of Parliament, unlawfully take or convey, or cause to be taken or conveyed any maid or woman child unmarried, being within the age of sixteen years, out of or from the possession and against the will of the father or mother of such child, or out of or from the possession and against the will of such person or persons as shall happen then to have by any lawful ways or means the care, keeping, governance, or education of any such maid or woman child; every such person so offending shall suffer imprisonment of his and their bodies by the space of two whole years.” That section takes a distinction between males and females. It makes the abduction of a girl under sixteen years of age a crime. But if a boy of fourteen years is engaged in the abduction of a girl under sixteen years, he is criminally responsible. Again, by the 10 *G.* 3, c. 34, s. 24, it was re-enacted that the abduction of an un-

married girl under sixteen years of age should be an offence punishable by fine and imprisonment; and the decisions upon that statute show that the abduction is a crime independently of the consent of the girl.

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We now pass on to the 24 & 25 *Vic.*, c. 100, ss. 55 & 56. The 55th section is only a modified re-enactment of the 10 *Car.* 1 (Ireland), sess. 3, c. 17, and the consent of the girl is, with respect to the crime being a misdemeanor, altogether immaterial. In the 56th section a child is defined as being under fourteen years of age; but the offence cannot be committed when the boy has attained fourteen years, because at that age he is supposed to be of discretion. Many other similar analogies might be referred to in the absence of express decisions; we ought to be guided by these and the undoubted current of opinion acted on by the Bench and the Profession, to the effect, that a boy at the age of fourteen years is taken to have attained the age of discretion. It might have been wiser, if so decided, to have established sixteen years as the age of discretion for boys as well as for girls. But it never has been so decided. If, in the case of a boy, we once pass beyond the age of fourteen, there is no point at which we can stop between fourteen and twenty-one.

Upon these grounds I have arrived at the conclusion that we, in the true exercise of our judicial discretion, must come to the conclusion that fourteen and not sixteen years is the age at which a boy is at liberty to exercise a discretion as to his own place of residence. It appears in the case before us that the boy William Connor has been examined by the LORD CHIEF JUSTICE and my Brother O'BRIEN in chamber, though such examination was not necessary for the purposes of this motion. He appears to be a boy of remarkable intelligence, and expresses a wish to stay in his present abode and not return to his father's custody. I am of opinion there can be no rule on the father's application.

HAYES, J.

We are called on here to decide how long that authority of a father continues, which entitles him to the possession of his son,

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and if necessary to apply to this Court to aid him in recovering that possession if he has in any way lost it. Until very lately, the general opinion of the profession has been, I believe, that the right ceased when the child, whether male or female, attained the age of fourteen years, and, in accordance with that opinion, this Court, in *Shanahan's case* (a), decided that a boy who had attained that age was not, on a return to a *habeas corpus*, to be delivered up to his father, against his will, but was of an age of discretion to choose his place of residence.

Let us here consider for a little the nature of the father's authority, or *patria potestas* as it is called in the ancient Roman law. *Heineccius*, in his *Elementa Juris Civilis*, § 137, tells us, that in ancient Rome a father had the same rights and authority over his children as a master had over his property or slaves; and in § 138 he gives the following instances:—"Patri etiam Romano competiisse jus vitæ et necis, in liberos. 2. Eundem potuisse filium venumdare et ter quidem, ex Romuli instituto; ita ut bis venditus, et toties manumissus, semper recideret in patriam potestatem, et non nisi tertium manumissus, sui juris evaderet. 3. Potuisse filium filiamque, a patre noxæ dari æque ad servum. 4. Quidquid acquiverant liberi patri fuisse adquisitum. 5. Non solum filios filiasque familias in patris, sed et nepotes neptesque, pronepotes, proneptesque ex filiis, in potestate avi del proavi paterni fuisse."

It is needless to remark, that no such absolute authority was ever claimed or allowed in England. The child, as soon as born, is entitled to the protection of British law for his person and property, equally with any other of her Majesty's subjects. It is his birthright; and it is only that there may be best secured to him the assistance and protection of law, and that he may acquire that education, the having which will enable him afterwards to discharge the duty which he owes, as well to his country as himself, that he is placed by the law under a guardianship during the earlier years of his life. As intimated by Lord Eldon, in the case of *Wellesley v. The Duke of Beaufort* (b), it belongs to the King, as *parens*

(a) 5 Ir. Jur. 58.

(b) 2 Russ. 1, 20.

patriæ, to care for those who are not able to care for themselves, and this authority (he tells us) is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves. So again, Lord Redesdale, speaking more clearly, in *Wellesley v. Wellesley* (a), says:—"It is a right which devolves to the Crown as *parens patriæ*, and it is the duty of the Crown to see that the child is properly taken care of. And in the same case (p. 128) the same learned Lord asks:—"Why is the parent intrusted with the care of his children?" And he answers:—"Because it is generally supposed he will best execute the trust reposed in him; for that it is a trust, of all trusts the most sacred, none of your Lordships can doubt." . . . And he goes on:—"I apprehend it is impossible to say that the father has that absolute right which is contended for at the Bar. What are the grounds on which the custody of the children is given to the father? First—protection; then care and education. Is it not clear, that if the father does not give that protection—does not maintain the child—that the law interferes for the purpose of compelling the maintenance of that child? Is it not clear, that if the father cruelly treats the child in any manner, that a Court of criminal jurisdiction will interfere for the purpose of preventing that treatment? Is it to be said then, there is no jurisdiction whatsoever in this country that can control the conduct of the father in the education of his children?" Here then we have it established by unquestionable authority that the father's authority is derived from the Crown; that the father wields it as a delegated trust; that it is confided to him for the benefit of society; and that, like all other trustees, he is liable to supervision and correction in case he shall abuse his authority or neglect his duties. If then the parent be intrusted with the care and education of his child, and made responsible for the due performance of his duty, it is plain that he must also be endowed with that authority and power which is required to enable him rightly to discharge his duties; and such must be continued to him so long as, and no longer than, a necessity for it shall by the

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(a) 2 BL. N. Cas. 124, 130.

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law be deemed to exist. After that time, I apprehend, the control of a father over his child is regulated by other principles. His authority rests rather on moral than on legal grounds. On the one hand, the natural affection of the parent to his offspring, even when the legal obligation no longer exists, prompts him to a continuance of his care for the maintenance, protection, education, and general advancement of his child; while, on the other hand, these inestimable advantages are wisely considered by the child, when he has attained to years of discretion, to be cheaply purchased by a response of filial affection and gratitude, testified by a ready obedience to the wishes and commands of a parent whose most lively interest is concerned in his welfare.

But what is the time at which the *legal* rights and duties of the parent shall cease, and when the infant shall be deemed to have attained to such years of discretion that he shall be left by the law at liberty to reject the parental control if so disposed? The very latest authorities agree that, for the settling of this point, a Court of law shall not receive precocity of intellect as a test of discretion; on this clear principle that that very precocity may be a chief cause of peril. The earliest authority on this subject in our books is to be found in the *Year Book*, 8 *Edw.* 4, p. 7. It is as follows:—
 “Nota per *Danby, Choke, Needham, and Fairfax*. If one who
 “is guardian for nurture grant to me the guardianship of the
 “infant, to the intent that he shall marry my daughter; not-
 “withstanding that grant, he may well retake the infant; for
 “the wardship is only by course of law, to the intent that he ought
 “to see to the governance of the infant until he be of the age
 “of discretion,—viz., fourteen years, if male or female. But the
 “age of consent of a woman is fourteen years. And this guardian-
 “ship no other one can have except the father or mother. But
 “a stranger cannot justify the taking of an infant for nurture, &c.
 “But the guardian for nurture may deliver the infant to a man
 “for instruction and education, &c.; for he is only as his deputy,
 “to take care of the infant, and he may take him back when
 “he will.”

Here we may observe, that the duty of the guardian for nurture

is said to be for the care and education of the child; that it is only to be confided to the father or mother, and that it shall continue till the child has attained the age of fourteen years, that being called "the age of discretion." It is also to be observed, that the purposes which the guardian for nurture is thus to serve are the very same which, as we have heard from Lord Redesdale, lie at the root of all the delegated trust of parental authority. The foregoing passage from the *Year Book* has been cited with approbation by *Brooke* (tit. *Garde*, pl. 70); *Comyn's Dig.* (tit. *Gardian*, m.) *Hargreave's note* (*Co. Litt.* 88 b. n. 13), and, in our own times, by the Court of Queen's Bench, when giving judgment in *Alicia Race's case* (a). From the whole tenor of that very luminous judgment it is, I think, to be inferred that the Court, notwithstanding the passage cited from Sir J. Patteson's letter, contemplated the parent's right as guardian for nurture ceasing at fourteen; and that the Court, on a return to a writ of *habeas corpus*, was to act accordingly in dealing with the infant. However, as the child was there under the age of fourteen years, the question did not necessarily arise whether the parental authority continued after that age. The question has since arisen, with respect to a female infant above the age of fourteen and under the age of sixteen years; and in the case of *Regina v. Howes* (b) it has been held, that a father has a right to the custody of his daughter, even against the will of the child, who, without what appeared to the Court to be an adequate cause, was anxious to withdraw from his control. Is this decision to be confined to females, or does it extend equally to males and females?

There is no doubt a series of enactments on the face of the statute book, which have been from time to time passed by the Legislature in its special care for the protection of females and their property, from the acts and outrages of wicked men, and to which their sex was peculiarly exposed. I may shortly cite the English Acts of the 3 *Edw.* 1, c. 13; 3 *H.* 7, c. 2; the 4 & 5 *P. & M.*, c. 8; the 39 *Eliz.*, c. 9; and the 9 *G.* 4, c. 31, by which the previous enactments were repealed. To these, nearly corresponding enact-

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(a) 7 El. & Bl. 186, 193.

(b) 7 Jur., N. S. 22.

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ments will be found in Ireland, in the 10 *Car.* 1, sess. 3, c. 17; 6 *Anne*, c. 16; 19 *G.* 2, c. 13; and 10 *G.* 4, c. 34. The fact that so many statutes have been passed in both countries for the protection of females, shows clearly that their case was considered as a special one, and to be contra-distinguished from that of males; that whatever light is to be derived from them as to females, not a ray of it is cast upon the law as to males. In *Regina v. Howes* the Court, in giving judgment, dwells on the circumstance that the 9 *G.* 4, c. 31, s. 20, makes it a misdemeanor for any one to take an unmarried female under sixteen years of age out of the possession of her father, or other person having the lawful care or charge of her; and thence deduces the inference that the statute has pointed out the age of sixteen as the age up to which a female child shall be especially subject to the control of her father, and says that until that age a young woman cannot choose to act for herself. Assuming this to be so in England at that time, how stood the law in Ireland? By the 10 *G.* 4, c. 34, s. 24, the foregoing English enactment was made the law of Ireland. But by s. 23, it was made a misdemeanor if any one should fraudulently take an unmarried female possessed of property real or personal, and under the age of eighteen years, out of the possession and against the will of her father or other person having the lawful care or charge of her, and should contract matrimony with her, or defile her. Acting in the spirit which seems to have governed the Court in *Regina v. Howes*, and bearing in mind what was decided in *Regina v. Yore (a)*, viz.—that to sustain an indictment under this section, it is enough if the fraud has been practised on the person having the care of the young female, and not on the female herself,—might we not infer that eighteen years was the age fixed by the Legislature up to which a young woman possessed of property was to be held unable to choose to act for herself; whereas, if she had no property, her intelligence and discretion would have been more speedily developed by two years. But whatever might have been the decision of us, Judges of the Queen's Bench in Ireland, upon a case such as *Regina v. Howes* occurring before

(a) 1 Ir. Law Rep. 301.

us, with respect to a female infant in 1860, when the 10 *G.* 4 was in operation, the question in my opinion assumes a different complexion now, in the the year 1863, when the case is that of a male infant, and when the 10 *G.* 4, c. 34 has been repealed and the 24 & 25 *Vic.*, c. 100 has been enacted in its stead. By the 53rd section of that Act, it is made a felony for any one fraudulently to allure or take away any woman having real or personal estate, being under the age of twenty-one years (not eighteen, as in the former statute), out of the possession and against the will of her father or other person having the lawful care or charge of her, with intent to marry or defile her. So also by the 55th section, it is a misdemeanor to take any unmarried girl under the age of sixteen years out of the possession and against the will of her father or other person having the lawful care or charge of her. Both these sections would seem to declare that in one of them, at the age of sixteen, and the other twenty-one, the care and charge of the young female was in her father or some other person. But it has not been even contended at the Bar, that the parental authority should be extended to twenty-one or even beyond sixteen. Let me now call attention to the 56th section, which enacts that the unlawfully, either by force or fraud, taking away or detaining any child under the age of fourteen years, with intent to deprive any parent or other person having the lawful care or charge of such child of the possession of such child, shall amount to a felony. In the corresponding enactment of the 10 *G.* 4, c. 34 s. 25, the age of the child was fixed at ten years; but here, and apparently with the design of making it conformable with the termination of the period for nurture, and the attainment of the age of discretion, the age is fixed at not more than fourteen years; and as this section applies as well to males as females, may we not, while breathing the spirit of *Regina v. Howes*, say that here the Legislature has thrown a light on the subject by which we may be safely guided, and that it has impliedly said, that until the age of fourteen years, in both sexes, and not after that time (especially in the case of males), the party shall be deemed incapable of choosing to act for him or herself?

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Upon the whole of this case, and confining my observations to the case of a male child, which is what we have here to deal with, it appears to me that no sufficient reason has been shown for fixing any later period than the age of fourteen years as that at which it shall be deemed that years of discretion have been attained, so as to authorise us when a child of that age is brought before us, upon the return to a writ of *habeas corpus*, to leave him to make choice whether he will or not return to parental control, and to protect him in the choice he shall make. I come to this conclusion the more readily, because I feel that we are not here called on at all to overrule or interfere with the case of *Regina v. Howes*. It is sufficient for us here if that case be kept within the analogy by which the Judges of the Queen's Bench in England have professed themselves to be guided.

O'BRIEN, J.

The question before us is one of considerable importance, the decision of which will be of general application, by defining the period after which a father is to be deprived of his right to recover the custody of his sons, by summary application to a Court of Law, and after which he can no longer control or direct their education as effectually as he could before. Among the many cases to be found in the books respecting the rights of parents and guardians to the custody of children, there are very few bearing directly upon the question which arises in this case, namely, whether a father's right to recover, upon *habeas corpus*, the custody of his son, without reference to the son's wishes, is taken away by the mere fact of the boy having attained fourteen years of age. Counsel for the "Bird's Nest" institution rely upon the case of *In re Shanahan (a)*, decided by this Court, and that of *Hyde v. Hyde (b)*, before Sir C. Cresswell; but, in my opinion, for the reasons which I shall presently state, the decisions in those cases do not govern that now before us. Counsel for the father, on the other hand, rely

(a) 5 Ir. Jur. 58.

(b) 29 Law Jour., Mat. Cas. 150.

on the case of *The Queen v. Howes* (a), more recently decided by the Court of Queen's Bench in England, in which it was held that such right of the father with respect to his *daughter* continued until her age of *sixteen*. I find also that in an old case of *The King v. Delavel* (b) the Court refused to deliver up a daughter to her father, and allowed her to go where she pleased. In that case, however, the girl was about eighteen years old; and Lord Mansfield rested the decision of the Court, not upon her having attained the age of fourteen, but upon the father's ill-usage and misconduct towards her. In all the other cases to which we have been referred on the subject, including that of *In re Moore* (c) in this Court, the question arose as to the custody of children *under* the age of fourteen; and it was not necessary to decide the present question. In several of these cases also the father died without having appointed a guardian; and the claim was made by the mother as *guardian by nurture*, a species of guardianship which altogether determines when the child (whether male or female) attains the age of fourteen years. The law as to this guardianship by nurture is fully laid down by Lord Campbell, in the recent case of *The Queen v. Clarke* (d) (otherwise known as *Alicia Race's case*). According to his judgment, and the authorities to which he refers, it is clearly settled that, when a father dies leaving a child under fourteen, and without having appointed a guardian, the mother becomes guardian by nurture until the child attains such age, and that until that period the mother is entitled, without regard to the wishes of the child, to have it left in her custody (except she be guilty of such gross misconduct as mentioned by Lord Campbell in his judgment); but that, when the child attains the age of fourteen, the guardianship by nurture is at an end; and the result therefore is, that after that period the mother, as such guardian, can have no right whatever to the custody of the child. In the case now before us, it is contended for the institution that a similar rule should be adopted with respect to a father's rights over his son, and that, upon the son attaining the age

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(a) 30 Law Jour., Mat. Cas. 47: S. C., 7 Eng. Jur., N. S. 22.

(b) 3 Bur. 1434.

(c) 11 Ir. Com. Law Rep. 1.

(d) 7 El. & Bl. 156.

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of fourteen, the father also should be considered as no longer entitled to the custody of his son, if the boy be unwilling to remain with him. It will be found, however, that the rights of the father in respect of the guardianship of his children are far more extensive than those of the mother, and do not terminate at the period at which the mother's guardianship by nurture would cease. The father is guardian by *nature* as well as by *nurture*, and such his guardianship by *nature* continues until his son attains the age of *twenty-one*. Several authorities on this subject will be found in *M'Pherson on Infancy*, p. 61 to 63; and *Sir William Blackstone*, in his *Commentaries*, vol. 1, p. 453, states the law to the following effect:—"That the legal power of a father over the persons of his children ceases at the age of twenty-one." And again, "That point which the law has established when the empire of the father or other guardian gives place to the empire of reason,—yet, till that age arrives, this empire of the father continues even after his death, for he may by his will appoint a guardian to his children; he may also delegate part of his parental authority during his life to the tutor or schoolmaster of his child, who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed." This statement of the father's rights is confirmed by the English and Irish statutes of Guardianship. The Irish statute 14 & 15 *Car. 2*, c. 19, s. 6 (corresponding to the English Act 12 *Car. 2*, c. 24, s. 8) empowers every father "who has any child or children under the age of twenty-one years at his death, to dispose (by deed or will) of the custody and tuition of such child or children for and during such time as they shall respectively remain under the age of twenty-one years;" and, further, "that such disposition of the custody of such child or children shall be good and effectual against all and every person or persons claiming the custody of such children as guardian in socage or otherwise." And the statute also empowers the persons so appointed guardians by the father "to maintain an action of ravishment of ward or trespass for the recovery of any such child, against any person who shall

"wrongfully take away or detain such child, and to recover damages for the same in such action, for the benefit of such child;" and it also empowers them to receive the profits of the infant, and take possession of his personal estate, for his benefit, until he attains the age of twenty-one.

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With respect to this statute, it has been suggested, on the part of the institution, that a father can derive no authority expressly under it, as the powers of custody and control thereby given over infant children are given, not to the father, but to the guardian; that such fact would rather negative the possession of such powers by the father himself; and that the interference of the Legislature to give those powers to the guardians would show that the father had not been previously entitled to them; as, if he was, such interference would not have been necessary. In my opinion, however, a very different conclusion is to be drawn from these enactments of the statute. Their object was to extend the limited powers which a father previously had of disposing of the guardianship of his infant children after his death; to enable him to do so in all cases, by such deed or will as therein provided; and to give to the guardian so appointed the extensive powers therein mentioned as to the custody and control of the children. The statute was clearly requisite for these purposes. Without it the father could not have legally appointed guardians in all the cases thereby provided for, or transferred to them any powers of custody or control of his children; and no argument against his possessing, during his life, the powers therein mentioned, can be drawn from the fact of the statute having expressly given them to the guardians appointed by him. On the contrary, it appears to me that the statute, by enabling a father to confer such extensive powers upon others, implies that he himself was entitled to them during his life. It would be strange to hold that the Legislature intended to give to guardians appointed by a father greater power over his children than he himself if living would have had.

We have been referred to some old authorities, that the father's guardianship by *nature* was confined to his eldest born, and did not extend to his other children; but it is clear, from *Sir William*

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Blackstone's opinion and other authorities, that such distinction (if it ever existed) has long since ceased; and that such guardianship of the father extends over all his children until they arrive at the age of twenty-one. Counsel for the institution have also relied on the old rule of law, which entitled a boy, on attaining the age of fourteen, to enter into possession of lands held in socage, as showing *that* to be the age when he was considered to have arrived at the age of discretion. But it is to be observed that guardianship by socage, which was peculiar in its nature, also determined at the age of fourteen, at which period the guardian lost all power and control over the lands or custody of the boy; and that, accordingly, such rule cannot affect either the rights of the testamentary guardians under the statute, or those of the father as guardian by nature, which continued until the boy attained twenty-one. It was held by Holt, C. J., in *The King v. Thorpe (a)*, that the father's guardianship by nature continued, as to the custody of his son, until the age of twenty-one, though that was with respect to the custody of the body only.

Such then being the general nature and extent of the father's rights as to the custody of children under twenty-one, the next question to be considered is, what are the limits within which those rights are to be enforced by writ of *habeas corpus*, and what is the particular age of the child after which the Courts will not interfere for such purpose by that writ, and hand over the child against its will to the custody of its father? From the judgment of Lord Campbell, in *Alicia Race's case (b)*, and the observations of Chief Justice Cockburne, in *The Queen v. Howes (c)*, and other cases to which they refer, it may be laid down as a general rule that the Courts will not interfere in this summary manner if the child has attained such an age as should be considered the age of discretion, entitling the child to exercise its own free will, in opposition to that of its guardian, in choosing the place of its residence, whether with its legal guardian or elsewhere; and that whatever the rule as to such age may be, it should be acted on generally,

(a) Carthrew, 385.

(b) 7 EL. & BL. 191, *et seq.*

(c) 30 Law Jour., Mat. Cas. 47, *et seq.*

without reference to the more or less advanced state of the intellectual faculties of any particular child. In *Alicia Race's case* the child was only ten years old; the application was made by the mother, who claimed as guardian by nurture (the father having died without appointing any guardian); and the Court granted the mother's application for the custody of the child, without reference to the wishes of the child; holding that the mother's rights as guardian by nurture continued the same during the whole period of such guardianship (*viz.*, until the child attained the age of fourteen), and that the child would not be considered as having before that age attained the age of discretion entitling it to choose the place of its residence in opposition to the mother's will. I have already stated that, in a case such as that of *Alicia Race*, where the father died without appointing any guardian, and the mother was guardian by *nurture*, the child, on attaining the age of fourteen, would be entitled to choose its residence, even against the mother's wishes, and that the Court would not after that age transfer the child against its will to the custody of the mother. But that result would necessarily follow from the fact that at the age of fourteen such guardianship by nurture, and the mother's rights in respect thereof, altogether determine. After that period neither the mother nor any other person (except a guardian should be appointed by the Court of Chancery) would have any legal right to the custody of the child, or to direct the place of its residence; and, accordingly, without reference to the question whether the child should be considered as having at fourteen years attained such requisite age of discretion, the wishes of the child are, in such a case, the only criterion to enable the Court to decide how the child should be disposed of, or where it should reside. The case, however, is essentially different where the guardianship, such as that of the father or statutory guardian continues after the age of fourteen years; and the fact that after that age the wishes of the child as to its residence should be acted on by the Court, where there is no longer any legal guardian of the child, is no ground for a similar rule being adopted against the wishes of the person whose recognised and legal guardianship of the child still continues. One

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of the cases referred to by Lord Campbell, that of *In re Lloyd (a)*, affords an instance of the Court allowing a child, even under the age of fourteen, to select the place of its residence, on the ground that there was no legal recognised guardian, although unquestionably the Court would, without reference to the wishes of the child, have transferred it to the custody of such guardian if there had been one. In that case the application was made by the mother of the child, who was then between eleven and twelve years of age; but, as the child was illegitimate, and as in such a case the mother's right to the custody of the child terminated at the age of seven, the Court acted upon the wishes of the child. We have been referred, as I already mentioned, to some other cases in which the application was made by the father while the children were under the age of fourteen, and in which the father was held entitled to their custody irrespective of their wishes, without its being necessary to decide or consider whether he would have lost such right upon their attaining that age; and I do not find it stated by the Courts in any of those cases that the child's age of fourteen was the period after which the father was no longer entitled to recover on *habeas corpus* the custody of his child against its will.

I have already referred to the case of *In re Shanrahan (b)*, which has been relied on as an authority against the application of the father, now before us, and in which the Court refused to deliver to a father the custody of his son, whom he had left some years before in a deaf and dumb institution, where the boy wished to remain. It is true that in that case the Counsel who opposed the application argued that, as the boy had attained fourteen, the father was not entitled to his custody against his will; but it appears from the report of the case, and from the several affidavits filed in it, to which I have referred, that, although the father, by his affidavit filed in support of his application, stated that his son was under fourteen, yet that the boy was unquestionably over sixteen years of age, as shown by the documents connected with his original admission to the institution. The *decision* in that case does

(a) 3 M. & G. 547.

(b) 5 Ir. Jur. 1.

not therefore govern the present ; and the Court did not in their judgment adopt the argument of Counsel, that the father's right was lost when the boy attained fourteen.

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In this state of the authorities, it appears to me that the principle of the decision in *The Queen v. Howes* (a), already mentioned, is applicable to the question now before us. In that case the Court of Queen's Bench directed a girl aged fifteen, who had been brought before them on a *habeas corpus*, to be given, though against her will, into her father's custody, on the ground that until she attained sixteen the father was entitled to such custody irrespective of her wishes. It is true that the circumstances of that case were such as rendered the Court anxious, even for the sake of the girl herself, to place her under her father's control ; but the Court expressly decided the case, not upon its peculiar circumstances, but upon legal principles, laying down a general rule of law applicable to other cases where such peculiar circumstances did not exist. It has been contended, however, that the rule so laid down, though applicable to all *girls* under sixteen, was not applicable to the case of *boys* under that age, inasmuch as the decision was grounded on the English Act 9 G. 4, c. 31, s. 20 (same as 10 G. 4, c. 34, s. 24, Ireland), which enacted, that the unlawful taking away of an unmarried girl under sixteen from the possession and against the will of her father or mother, should be a misdemeanor punishable with imprisonment, whereas there is no similar enactment as to boys. It appears to me, however, from the opinions expressed by the Judges, that the rule they laid down was intended by them to apply as well to boys under sixteen as to girls, and that the reasons upon which their decision was grounded were applicable to both cases. Chief Justice Cockburn, in several parts of his judgment, refers to the question they had to decide as one affecting "*children*" generally, without making any distinction as to their being boys or girls ; and he expresses his opinions on that question in similar general terms. Thus he says (b) :—" The cases which have been decided on the "subject show that, though the father is entitled to have the

(a) 30 Law Jour., Mat. Cas. 47.

(b) 30 Law Jour., Mat. Cas. 48.

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"custody of *his children* up to their attaining the age of twenty-one years, the Courts of Law will not interfere by *habeas corpus* to withdraw a *child* from the custody of persons with whom *it* may be, and hand *it* over to the custody of *its* father, if *it* has attained the age of discretion and is capable of understanding the position in which *it* is placed. The whole question is—at what age a *child* can be said to arrive at the age of discretion?" And again:—"We are bound to see that we act upon some general rule as to the age at which a *young person*, though a minor, may be left to the freedom of choice which the law recognises." Having thus stated, in terms applicable to children generally, without distinction of sex, the question before the Court and the nature of the rule they had to lay down, he goes on to say:—"The Legislature has thrown light upon the subject which may safely guide us—the age of sixteen is pointed out as the age up to which a child ought to remain under parental control—for it has been held, that even the consent of a female child who has been taken away from her father is not sufficient to justify those who so take her away; such a taking away, even with her own consent, is by the law constituted an offence." In this latter passage, Chief Justice Cockburn refers to the English statute (9 G. 4, c. 31) already mentioned, and in stating that "*the Legislature thereby threw light which* might safely guide the Court," he appears to have regarded the statute as having proceeded upon the principle, that a girl under sixteen had not attained the requisite age of discretion entitling her to choose her residence against her father's will; and as being in fact a Legislative declaration to that effect, adopting that principle as declared by the statute, the Court laid down a rule which, even as affecting girls, would be applicable to cases not within the provisions of the statute. The statute prohibited the *abduction* of a girl under sixteen; but the rule laid down by the Court would apply to the case of any girl under sixteen, who left her father's house or refused to reside where he directed, though she did so of her own accord, without the intervention or privity of any other person, and without there having been any abduction under

the statute. It is true that the Court, in deciding the case of *The Queen v. Howes*, acted upon the inference which, in their opinion, was to be drawn from the statute—namely, that with respect to *girls*, the age of sixteen should be considered as the requisite age of discretion; but, from the general terms in which Chief Justice Cockburn (without referring to any distinction of sex) states the legal question before them and the nature of the rule which the Court was to lay down, it appears to me that they considered the inference drawn from the statute as to girls should also be acted on with respect to boys; and that as sixteen was fixed on as the requisite age of discretion for girls, there was no reason for not adopting a similar rule with respect to boys. The observations of the Court on an opinion given by Mr. Justice Patteson further shows, that they considered the rule which they laid down was applicable as well to male as to female children; and the opinion of that eminent Judge is in itself an authority to the same effect. That opinion is contained in a note to a collection of *Oriental Cases* decided by Sir *Erskine Perry*, when Chief Justice of Bombay, and is referred to by Lord Campbell in his judgment in *Alicia Race's case* (a). It appears that several cases involving the rights of fathers to the custody of their children had come before the Courts in India for decision; that in one of them, Sir E. Perry's Court had, upon a writ of *habeas corpus*, ordered a Hindoo boy of *twelve* years to be delivered to his father; and that Sir E. Perry, for his own future guidance in such cases, submitted the question to Mr. Justice Patteson, whose answer was as follows:—"I cannot doubt that "you were quite right in holding that the father was entitled to "the custody of his child, and enforcing it by writ of *habeas corpus*. "The general law is clearly so; and even after the age of *fourteen*; "whereas this boy (Shripat) was only twelve." (The rest of the opinion refers to the question of the father forfeiting such right by misconduct). This is an express opinion in favour of the right contended for by the father in the case now before us. It is true it was not a decision to that effect; but in the absence

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of any contrary decisions, the opinion of so eminent a Judge, deliberately given by him, with a view to its being adopted in future cases by Sir E. Perry, who had applied for it for his own guidance, is certainly entitled to considerable weight. The entire of the opinion is quoted with apparent approval by Lord Campbell, who adopted that part of it (as to the father's right being only forfeited by misconduct) which bore upon *Alicia Race's case*, and did not express any dissent from that portion of it which stated the continuance of such right after the age of fourteen. In the case of *The Queen v. Howes*, Chief Justice Cockburn (according to the report in *7th Jurist*, N. S., p. 22), after referring to that opinion, adopts it as showing, "that the right of the father extends beyond the age of nurture; it extends to the age of discretion." He thus contrasts the age of nurture with that of discretion, as they affected the father's right to the custody of his child; stating that those rights were terminated at the latter age but not at the former, and making no distinction but in the case of male and female children, though he relies, in support of the rule he laid down, upon the opinion given by Mr. Justice Patteson in the case of a boy. Would he have concurred in that opinion, and expressed himself in this manner, if the Court thought that, with respect to a father's rights over his son, the period of the age of discretion were the same as that of nurture, or except they considered that in the case as well of sons as of daughters the age of discretion, so far as regarded the father's right to their custody, was different from the age of nurture?

It has indeed been contended that, even if the Court, in *The Queen v. Howes*, purported to lay down a rule applicable to boys as well as girls, their opinion, so far as related to boys, was extra-judicial, inasmuch as the case before them was that of a girl. It appears to me, however, that the unanimous opinion of the Court, laying down a general rule to be thereafter acted on, given after they had (as stated by Chief Justice Cockburn) consulted with the Judges of the other Courts, should not be disregarded on the allegation of its being extra-judicial, but should be followed by us, except it be opposed to principle or authority. But, even

supposing that the rule laid down in *The Queen v. Howes* was only as to girls, or that if the judgment of the Court extended it to boys it should be regarded as extra-judicial, and therefore not binding on us; the decision at all events establishes that a girl does not before sixteen attain the requisite age of discretion; and if this be the rule as to girls, why should we adopt a different rule as to boys, and hold that they attain such age of discretion at an earlier period? So far as the several ages of discretion for males and females would depend upon their comparative mental capacity at the same periods of their lives; it has been considered for many purposes that the intellectual faculties of females were more advanced than those of males of the same age, and that accordingly the age of discretion for females should be fixed at an earlier period of their lives than for males. Thus, until the passing of the new Statute as to Wills in 1837, a girl was considered as capable of making a valid will of personal estate at the age of *twelve*, whereas a boy could not do so till he was fourteen. And other instances may be referred to, in which the same principle was recognised.

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If, again, in fixing the age of discretion, we are to consider what would be for the benefit of the children themselves, how does the case stand? It is true, as has been urged, that girls are exposed to peculiar dangers, which render it desirable, for their own safety, that their father's control over them should continue beyond the age of fourteen: but can it be said that boys would be exposed to no danger (though of a different character), or that their prospects in life might not be injuriously affected by their being left free at the early age of fourteen to abandon their father's house and choose their own residence? The rule to be laid down is one that would be applicable to every case, not merely to persons in an humble class of life, but to those of rank and position. The age of *sixteen* is generally about the time when the school education of boys terminates, and when they should enter on the peculiar studies and training which are requisite for the profession, trade, or business for which they may be designed. In laying down a general rule, it cannot be contended

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that, *before* the age of sixteen (at all events), boys have acquired sufficient intelligence and judgment to be left with safety to their own guidance, and to be at liberty to leave perhaps the school in which they were placed by their parents, and reside with any other person who may be willing to receive them. And though the result of previous decisions is, that Courts of Law cannot enforce upon *habeas corpus* the right of a father to the custody of his sons, against their will, after the age of sixteen, it will, I think, be conceded that, having regard to the interests of the children themselves we should not (except we are bound by authority to do so) fix an earlier age as that when such right could no longer be enforced, and when the father's control would be so much abridged. If the father were dead, having appointed guardians under the statute, and his sons were made wards in Chancery, the guardians might avail of the powers of that Court to enforce their right to the custody and tuition of the sons until that age at all events; but, upon the principle contended for here by the Counsel for the Institution, the father, through whom the guardians' power was derived, would himself (if he were alive) be unable to enforce such right, as his only remedy (*viz.*, an application on *habeas corpus*) would not, as it is contended, be available after the age of fourteen.

Lord Campbell, in his judgment in *Alicia Race's case* (p. 194), refers, in strong terms, to the injurious consequences of allowing a boy, under the age of fourteen, to exercise a free choice as to his place of abode, irrespective of his father's wishes. Lord Campbell was dealing with the rights of a guardian by nurture (which guardianship determined altogether at the age of fourteen), and he therefore confined his observations to the case of children under that age; but the guardianship of the father continues, as we have seen, beyond that age; and the observations of Lord Campbell may be also well applied to the case of a boy between fourteen and sixteen, and to the rights of a father over him during that period.

Some authorities have been cited in which boys of the age of fourteen were held entitled to choose their own guardians, and

were considered to have attained a sufficient age of discretion for that purpose; but it will be seen that these were cases in which the boys, on attaining fourteen, had in fact no legal guardians—cases where the father had died without appointing guardians under the statute, and where the guardianship by socage, or that of the mother by nurture (as the case might be), had absolutely determined; and where, from the very necessity of the case (there being no other person legally entitled to interfere), the boy was allowed a choice in deciding who his guardian should be. These authorities, therefore, derogate in no respect from a father's rights of guardianship during his life; and it was never suggested that a boy on attaining fourteen was entitled during his father's life to substitute any other person as guardian in his father's place; or was entitled, after his father's death, to substitute a guardian of his own choice for the statutory guardian appointed by his father.

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We have also been referred to the case of *Hyde v. Hyde*, in the Divorce Court (a), where Sir C. Cresswell directed that a boy of about thirteen should be delivered by the father to the mother, and should reside with her till the age of fourteen; and also expressed his opinion, that at such age the boy would be entitled to elect for himself with which of his parents he would remain. But in that case the mother had obtained a decree for judicial separation, on the ground of adultery, against the father, who still lived with his mistress and kept his son in the same house with her, and the boy had received great ill-usage while there. These circumstances of immorality and misconduct on the father's part would (according to the principles laid down in Lord Campbell's judgment in *Alicia Race's case*) have been considered (even by a Court of Law) as a forfeiture of the father's right to the custody of his son, and as sufficient to prevent the Court from delivering the child (though under fourteen) into the father's custody. It is also to be observed, that Sir C. Cresswell's order was made, not upon *habeas corpus*, but under a special power given by the 35th section of the Divorce Act (21 & 22 Vic., c. 85),

(a) 29 Law Jour., Mat. Cas. 150.

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which enabled the Divorce Court, in case of such suit, to make such order and provision as it might think fit for the custody, maintenance, and education of the children of the parties. As the father had by his misconduct forfeited his right to the boy's custody, the Court, under its statutory power, directed that the boy should reside with his mother. The question was, how long such residence should be compulsory? And Sir C. Cresswell, after referring to the rule laid down in *Alicia Race's case*—that, if the father were dead, the rights of the mother, as guardian by nurture to the custody of her child, would determine at the age of fourteen,—decided in analogy to that rule, that the boy's residence with the mother should not be compulsory beyond that period; but the general principle of a father's right to the custody of his son *after* that age, was not affected by deciding that, where the father by his misconduct forfeited the rights he had, even under that age, then that the boy, after attaining that age, should not be compelled to reside with the father. It is also to be observed, that the power of choice which Sir C. Cresswell considered the boy would have after fourteen, was not a power to reside where he liked, but to elect with which of his parents he would reside. I do not think, therefore, that this case is any authority against the application of the father in that now before us, there being no suggestion of any misconduct on his part.

Mr. *Curran*, in support of the father's application, has referred us to the provisions of the Poor Law Act of 1838, s. 53, making a husband liable for the support of children under fifteen. That section however makes him liable, not merely for all his own children, but for all the children, whether legitimate or illegitimate, which his wife may have had at the time of her marriage with him, and does not, in my opinion, bear upon the present question. The Reformatory Act of 1857, however, furnishes an instance more in point of the effect upon the father himself of depriving him of all legal right to his son's custody at the age of *fourteen*, and of the propriety of continuing that right until the boy attained *sixteen*. By that Act, any boy or girl under *sixteen*, convicted of an offence, is liable to be sent to a reformatory for any period between one and

five years; and during the entire of that period the father, if of sufficient ability, may be summarily compelled by a Magistrate to contribute, from time to time, five shillings weekly, to the maintenance of the child. This legislation proceeds upon the principle of making the father responsible for any crime which the child, whether male or female, might commit when under the age of *sixteen*; and the consequences of that responsibility might continue long beyond that period, and during the entire time of the child's imprisonment. It may be right to make the father thus responsible for offences committed by a child during the period when the father was legally entitled to its custody, to direct its education, and compel its residence with him; and thus to preserve it from the society of improper associates, and the bad habits thereby acquired; but it would I think be most inconsistent to hold that, though the father was thus made responsible for any offence which his son might commit up to the age of *sixteen*, he should nevertheless, when the boy attained *fourteen*, be deprived of that power of effectually controlling the boy's conduct which he would have by his residence with him. It may fairly be supposed that the Legislature, in making the father responsible for offences committed by his children, whether male or female, while under the age of *sixteen*, regarded that age as the period up to which the father had such right to the custody of his children, male and female, and such power over them as would have enabled him, by due care and the proper exercise of his authority, to keep them out of crime; and, by applying to the present case the observations of Chief Justice Cockburn, in *The Queen v. Howes* (a), with respect to the 9 G. 4, c. 31, s. 20, it may be said that by the provisions of the Reformatory Act the Legislature has thrown light upon the subject which may safely guide us, and has pointed out the age of sixteen as the age up to which children, whether male or female, should remain under their father's control.

It has been also suggested, during the discussion of this case, that the decision in *The Queen v. Howes* (even supposing it applicable to boys), is affected by the subsequent statute 24 & 25 Vic., c. 100,

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which (after re-enacting in section 55 the provisions of the 9 G. 4, c. 31, s. 20, as to unlawfully taking any unmarried girl under *sixteen* out of the possession of her father or mother), provides, in section 56, that the *forcible* or *fraudulent* abduction of *any child* under fourteen from the custody of its parent or guardian should be punishable as a felony; and it is suggested that these enactments and the distinction thereby made between girls and boys, indicates the intention of the Legislature that the right of a parent or guardian to the custody of a boy should cease at the age of fourteen; but that 56th section was merely a re-enactment of a similar provision contained in the previous Acts of 9 G. 4, c. 31, s. 20 (*Eng.*), and 10 G. 4, c. 34, s. 25 (*Ir.*), with this difference, that those former Acts provided that the child whose *forcible* or *fraudulent* abduction was so punishable should be under the age of *ten*; whereas the latter Act extended such provision to the case of any child under fourteen. These provisions as to children under *fourteen* apply only to cases where the abduction or detention of the child is effected by force or fraud; whereas the enactment on which the decision in *The Queen v. Howes* was grounded made the mere taking away of a girl under sixteen punishable as an offence, though the abduction should be neither forcible nor fraudulent. It appears to me therefore that no argument against the application to the present case of the decision in *The Queen v. Howes* can be drawn from this recent statute. Before it was passed the *forcible* or *fraudulent* abduction of a boy was punishable only if the boy was under *ten*; and yet the right of the father to the boy's custody was confessedly enforceable on *habeas corpus* until the boy attained *fourteen*: which shows that the latter right should not necessarily be confined within the same limits of age as were prescribed by the former Acts with respect to the offence. And the recent statute, so far from indicating any intention of abridging the father's rights, has in fact afforded a better security for them, by extending, from the boy's age of *ten* to that of *fourteen*, the period during which a father, in addition to his power of proceeding by *habeas corpus*, could also punish the party who effected the abduction or detention of the boy by force or fraud. Reference has also been made to the statute of

10 *Car.* 1, c. 17, which fixes the age of fourteen as the period after which a boy should be punishable for the abduction of a girl under *sixteen*. That, independent of any question as to the age of discretion, a reason may be suggested for that provision as being in analogy to the rule of law, which held that until a boy attained fourteen, he was not liable to the charge of female violation.

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From the importance of the principle involved in this case, and the circumstance of my differing in opinion with the other Members of the Court, my observations have extended to much greater length than I had wished. I am of opinion, for the several reasons I have stated, that we should comply with the father's application. It is admitted that he should succeed if the boy was under fourteen. The cases in which it has been held that the rights of a mother, guardian by nurture, to the custody of her child ceases at the age of fourteen, do not affect the present question, because her guardianship by nurture determines altogether at that age; whereas the guardianship of the father is recognised by statute and authority as continuing until *twenty-one*; and in no case has it been decided that the circumstance of any child, male or female, attaining the age of *fourteen*, deprives the father of the power to enforce by *habeas corpus* his right to the custody of that child. In this absence of any authority against the present application, we have the deliberate opinion of Mr. Justice Patteson, quoted without dissent or qualification, both by Lord Campbell and Chief Justice Cockburn, that by the general law a father is entitled to the custody of his son, and to enforce that right by *habeas corpus*, even after the son's age of fourteen. It is true that such power does not continue during the whole period of the father's guardianship until the son attains *twenty-one*; and we have therefore to decide at what intermediate period between those ages of *fourteen* and *twenty-one* a boy should be considered as attaining the age of discretion, which entitles him to exercise his own will, as to his place of residence, in opposition to his father's wishes. Upon this question it appears to me that the decision of the Queen's Bench in England, in *The Queen v.*

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Howes, affords us a clear and intelligible ground on which we may proceed; and, even supposing that the Court in their judgment in that case, and in fixing the age of sixteen as such intermediate period, did not profess to lay down *a rule* applicable to male as well as to female children, it appears to me that the principles and reasoning on which they proceeded are applicable to both. If the age of sixteen be (as settled by that case) the period at which a girl is considered of sufficient discretion to select her own residence against her father's will, I see no reason for fixing an earlier period as to boys; and it is only in accordance with the principles of our law in other cases to hold that at all events boys should not be considered as attaining the requisite age of discretion at an *earlier* period of their lives than is held with respect to girls. The provisions of the Reformatory Act, to which I have referred, making no distinction between male and female children, has made their father responsible, to a certain extent, for their conduct up to their age of *sixteen*, and has thereby afforded grounds for holding that the effective power of the father to enforce upon *habeas corpus* his right to the custody of *all* his children, should be continued until that age; and for inferring that the continuance of such power during that period was contemplated by the Legislature.

I have to observe, in conclusion, that in adverting to the injurious consequences that might result from allowing boys at the age of fourteen the selection of their own residence, and direction of their conduct, against their father's will, and to the obvious policy of continuing the effectual control of their father over them after that age, I have done so, not as affording a reason for our exceeding our jurisdiction, if it appeared from previous decisions that we should do so by granting the present application, but as showing that, in the absence of any decision to the contrary, we should the more readily act on the principles to be collected from the several statutes and authorities to which I have already referred, and which, in my opinion, establish that we should be fully warranted in laying down the rule contended for by Counsel for the father on this application.

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If we sat here, not to administer the law, but to make the law according to what might appear to be upon general principles more convenient—to fix a limit more desirable than that which the law, as long as we can trace it back, has fixed as the age of discretion, the age at which the male sex is considered to have arrived at that period of life which invests each of its members with all the legal incidents which, during the whole of the period through which we can trace back the law, have been conferred upon the male on the attainment of the age of fourteen years—I should shrink from altering the law. I should also shrink from, and be perplexed by the difficulty of determining—if once we depart from what the law has settled—the proper age, and finding out a new period of discretion between fourteen and sixteen years. In the present case therefore, if I had no other reason for acting on the principle “*stare decisis*,” I should say that in this case we ought not to depart from all the decisions which have already been so fully and accurately referred to by my Brethren who have preceded me. Indeed, on both sides, all the decisions that could be conceived to bear upon the case have been adverted to. But the great ground upon which Mr. *Curran*, who argued this case on behalf of the prosecutor, insisted that, in the present instance, in which the boy has passed the age of fourteen years, we should depart from the rule, and fix a new period of discretion, namely, sixteen years, the age at which it was decided by the Court of Queen’s Bench in England that a girl is considered to arrive at the age that entitles her to the same privileges as a boy attains at the age of fourteen years, was the decision in the case of *The Queen v. Howes* (a). But I still ask, as I asked when Mr. *Curran* put the argument which he derived from that authority,—why did the Judges who decided that case have recourse to the statute 4 & 5 P. & M., c. 8, and to the later statute, 9 G. 4, c. 31, which adopted it,—why did they find it necessary to refer to those statutes as justifying them in holding that sixteen years was the age at which the female would

(a) 7 Jur., N. S. 22; also reported in the 30 Law Jour., N. S., Mat. Cas. 47.

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be entitled to this privilege of deliverance from the authority of her parent? If the law had settled that sixteen years was the age for both males and females, why should the Court of Queen's Bench in England, in the case of *The Queen v. Howes*, have thought it necessary to have recourse to the statute to authorise the decision which they made in that case? Did not the very circumstance of their having recourse to the statute to justify their decision in that case for departing from the age of fourteen, which, previously to that statute, was the age of discretion for both males and females, show that until the passing of that Act the law had fixed the same age, namely, fourteen years, as the age of discretion for both males and females? I confess therefore that I cannot help continuing to feel, what I felt upon the occasion of the argument of the present case, that the very decision which was referred to as a ground for acting in this case upon the rule that sixteen years is the age of discretion in the case of a boy, was perfectly decisive against the argument by which we were called upon so to act.

Now that, previously to the passing of the statute which altered the law as to females, fourteen years was the age which had been settled by the law, as long as we can trace back its history, as the age of discretion for both males and females, appears from the case in the *Year Books* to which one of my learned Brothers (HAYES, J.) has traced back the law upon this subject. I shall take up the law at an intermediate period, namely, as laid down in *Co. Lit.*, section 123, who informs us upon this subject of the age of discretion:—"Also in such tenures in socage, if the tenant have issue and die, his issue *being within the age of fourteen years.*" Then he goes on to state who shall be the guardian, and afterwards proceeds thus:—"And when the heyre cometh to the *age of fourteen years* complete, he may enter and oust the guardian in socage, and occupy the land himself, if he will." Now, if the law allowed that fourteen years was the age of discretion which enabled the heir in the wardship, when entitled to land, to oust the guardian, to enter upon the land, and to occupy it—if he could do all this at that

age, I desire to know what more perfect test can be found than that as to the age of fourteen years being in the contemplation of the law the age of discretion at which the law,—whether wisely or not (with that question we have nothing to do) held that the male infant was discharged from the guardianship, and considered to have arrived at the age of discretion, so as to enable him to occupy his property, and become the master of it? Upon what principle of law then are we now to say that we will alter that rule, when it is and must be admitted that there is not a single authority, from that time to the present, which has decided that the age of fourteen is not for males the age of discretion?—I say, not a *single* authority, because, as I have already observed, the case of *The Queen v. Howes*, instead of being an authority for that proposition, implies that the Judges, having had recourse to the statute law, had in respect to the common law no authority whatsoever to support their decision. We are now required by the prosecutor to act with regard to boys on an analogy to that statute which has surrounded girls with a protection which it was not necessary to throw around the other sex. With that view the Legislature have made it a criminal offence to take away from her parents or guardian a female who is under sixteen years of age. But that statute was founded on the peculiar circumstances of those for whom it made provision, and gave a security which it was deemed important to provide, while the mere enjoyment of property was still left to the person at the age of fourteen years, at which the law, not having been changed in that respect, said that he had a title to enter upon his land and then occupy it. We see therefore how it came to be thought that in the case of males the age of fourteen years was the age at which they were entitled to be discharged from the guardianship by nurture. Then, when the male infant was not entitled to land, the law provided the guardianship by nurture or nature. If the male infant was entitled to land in fee-simple, there was no rule; but if entitled to it in socage, the rule was that which I have stated. Guardianship by nurture adopted the age of fourteen years as the period for its

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termination by analogy to the termination of the guardianship by socage. For the Courts held that, if fourteen years was the age at which the male infant was entitled to the management of his property, he might properly at the same age be discharged from the guardianship by nurture. Mr. *Hargrave*, in the *note* at p. 88, to *Co. Lit.*, s. 123, has investigated the various kinds of guardianship which the law recognises. He observes that there has been such a vague use of the term "guardian" that for the instruction of the profession he has collected into this note all the law respecting all the various species of guardianship; and what he says about guardianship by nurture is that "though what our law calls guardianship by nature is thus confined to the heir apparent, yet we must not from thence conclude that parents have not a right to the custody of their other children; for our law gives the custody of them to their parents till the age of *fourteen* by the guardianship of nurture." The law gives to the parents the guardianship by nurture till the age of fourteen years.

The law is impugned as an absurdity for allowing a child to become master of himself at that age. It may be so: and it is, perhaps, true that, if we were now for the first time to fix a period for the determination of the guardianship by nurture, we might not establish the age which the law has settled for centuries. Therefore, when *Blackstone* says in his *Commentaries*, as quoted by my Brother O'BRIEN, that twenty-one years is a better age, that may be so; but *we* cannot depart from the law as we find it. Here we have to determine at what age the guardianship by nurture terminates. I have read from *Co. Lit.* the passage by analogy to which the Courts have held that guardianship by nurture ends at fourteen years. It is said, that the case of *The Queen v. Howes* has settled the contrary. I have read the judgment in that case as reported in two different reports. No doubt, Chief Justice Cockburn in his judgment occasionally used the word "child." But, in the first place, confessedly, a female infant only was the subject-matter of the decision in that case. Though, therefore, Chief Justice Cockburn occasionally used the ambiguous

word "child," it appears most clearly to any one whose mind has been called to mark every instance in that judgment in which the word "child" is used, that, by reference to some antecedent or subsequent sentence, he meant *the* "child" who was the object of the application which was made in that case—namely, a female child. And why should the Court have meant—and it is perfect demonstration that they did not mean,—to decide anything with respect to a male child? If such was their intention, why refer to the statute as a ground for coming to a different decision? Is not that reference decisive to satisfy us that no fair construction of what they have decided can give to their decision in *The Queen v. Howes* the effect which the prosecutor here seeks to give it? Indeed, we would not be doing justice to those learned Judges if we supposed that they went out of their way to declare anything as to male infants, when a female infant only was the subject-matter of their decision.

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It was also argued by Mr. *Curran*—why should the Legislature have given to the parent power under a statute to appoint by will a guardian for his infant children if that power was not his before? Could we suppose, it was asked, that the Legislature would enable a parent to delegate by will to a guardian a power which the parent himself did not possess? The very interference of the Legislature to give that power of appointing testamentary guardians accounts for itself. The statute was passed in order to confer a power which the parent had not; and the testamentary guardian, when appointed, is invested with a power which the statute defines and ascertains. He is not bound by the age of fourteen years, because he is the guardian, *not by nurture*, but under a statutable authority which the Legislature in their discretion thought it wise to bestow: and it is remarkable that the statutable power may be exercised by a person who is under the full age of twenty-one years,—such a person may appoint a testamentary guardian. But the exercise of the power must be regulated by following the provisions of the statute: it cannot regulate us in the exercise of the duty which we are now called upon to discharge. We have now before us a case in which a male infant has been

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rescued from custody which its father alleged to be illegal. The boy has been brought before the Court by a writ of *habeas corpus*. His father calls upon us to deliver up into his custody this boy, his son, who is now above the age of fourteen years. Fourteen years is the age of discretion for males; and it is more satisfactory that, in carrying out the law in this particular instance, we should follow that rule.

All the authorities have been already very fully cited, and it would be a mere waste of the public time for me to go through them again. The result is, that not a single authority has been produced in support of the prosecutor's claim, though there may be the *dictum* of a learned ex-Judge in a case in which the law had been carried out in India by a Judge in that country. It does not always happen that the most learned person is Judge there. But, unquestionably, his exercise of power, resting upon no authority whatever, ought not to have been approved of by Sir John Patteson, whose *dictum* is against the whole current of decisions. I do not mean to say, that the precise question was pointedly put for decision in any case: but that fourteen years is for males the age of discretion has been assumed in every case. Lord Kenyon, C. J., has said, over and over again, that an unvarying current of authority establishes the law as much as if the particular question had arisen and been disposed of in any particular case. We have on this subject an unvarying current of authority to *support* the rule which we have no right to break; not a single case varying that rule can be adduced. No doubt, there are several cases in which the Court has refused to give to children *under* fourteen years of age freedom from the guardianship by nurture. But these decisions were all made with reference to children *under* fourteen years of age. It is so long since I have read *Blackstone's Commentaries* that I do not exactly remember upon what ground he suggests twenty-one years as the fittest age of discretion. But, at all events, whatever weight of authority we may be disposed to give to an elementary book, *we* have only to state what the law is.

Under these circumstances, I concur entirely with my Brothers

HAYES and FITZGERALD in their opinion, that we must, upon this occasion, do what we have hitherto done on other similar occasions, and go upon the principle which hitherto has been recognised as the principle which ought to guide us when a male infant of legal discretion, being of the age of fourteen years, requires to exercise the discretion with which the law invests him at that age. We must refuse the father's application in this case, and declare that the boy William Connor is at liberty to go and remain wherever he pleases. It is pleasing to think that he, by his examination, has reflected great credit on the institution in which he has been placed; and it is satisfactory that his choice is to remain at that place of education.

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E. T. 1863.

Exchequer.

POPE v. COATES.*

May 7.

June 11.

E. T. 1865.

April 24.

COATES, plaintiff in Error; POPE, defendant in Error.

A wrote a letter to the Poorlaw Commissioners containing charges against B, a poor-rate collector. B resigned the collectorship. At a meeting of Poorlaw Guardians to elect collectors for the ensuing year, B was appointed collector in his former district. The Commissioners refused to sanction his election, and by letter informed the Guardians of the charges made against him by A. The clerk of the union read this letter at the next meeting of the Guardians, and B recovered damages from A for thus publishing a libel upon him. At a subsequent meeting of the Guardians, relative to the election of a collector in place of B, at the request of a Guardian who had not been present at the preceding meeting, the clerk read again the letter from the Commissioners.—*Held*, reversing the decision of the Court of Exchequer, that the second reading of the letter containing the charges by A against B was not a publication of the libel by A.

THIS was an action for libel and slander. The first count in the plaint charged that, at a meeting of the board of Poor-law Guardians of the Clonmel Union, upon the 8th of May 1862, and at subsequent meetings, the defendant falsely and maliciously published, and caused to be published of the plaintiff, as a collector of poor-rate, and in relation to that office, the malicious and defamatory libel following:—"I beg to submit the following statement, having reference to the conduct of John Pope, a poor-rate collector for the Electoral Divisions of Graignagower and Ballymacarbry, in the Clonmel Union, those divisions being the estate of the Earl of Stradbroke. His lordship gave me, his agent, directions to have the game strictly preserved; and this Pope having for some years past been in the habit of having a gun and greyhound with him when, as he alleges, he was engaged collecting rates, he took the opportunity of killing game. It so happened that, on the 30th of October last, Lord Stradbroke's caretaker, James Belford, found him on the lands of tenants of Lord Stradbroke, with the gun and greyhound in search of game, when summonses were issued against him at the suit of those tenants; and after various postponements the cases were heard at the Petty Sessions of Ballymacarbry, on the 10th of March instant, when Pope was fined £5. Here, his subsequent conduct appears to me most illegal,

† * *Coram* FIGOT, C. B., FITZGERALD and DEASY, BB.

“and justifies me in asking for an explanation by your honorable board, with a view to his immediate dismissal. He, Pope, had been in the habit of furnishing me with an account of the rates payable by Lord Stradbroke; and on the last rate being struck, namely, on the 5th of December 1861, Pope furnished his account, omitting an item, namely nine shillings, for a holding lately given up to Lord Stradbroke, and in which James Belford was put in possession as caretaker. Immediately after Pope was convicted by the Magistrates, as before stated, he rushed out of the Court-house with two men, and, proceeded to the house so occupied by Belford, and calling him ‘a perjurer,’ seized a gun for the rate of nine shillings; and although the sum was paid upon the spot by the bailiff of Lord Stradbroke, he, Pope, charged two shillings for the seizure, and two shillings each for his two men, which was also paid, and for which I hold his receipt. I am well-assured this conduct will never be countenanced, as had Pope theretofore demanded the rate, or included it in the account he furnished, he would have got paid, as well he knew.—I have the honour to be, &c. &c., ABRAHAM COATES.”

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Innuendo—that the plaintiff had made an illegal seizure, before demand, and had exercised his office oppressively. Special damage, the dismissal of the plaintiff from his office.

There was also a count for slander, which charged that, when the Guardians of the Clonmel Union were proceeding to elect a poor-rate collector for the above electoral divisions (to which office the plaintiff was re-elected by the Guardians), the defendant said to some of the Guardians who supported the plaintiff as a candidate, “why do you support him?”—(meaning the plaintiff).—“At the workhouse you ought not to support a poacher.”

To the count for libel the defendant pleaded a traverse of the publication, no libel, privileged communication; and that judgment for forty shillings, and sixpence costs, had been recovered by plaintiff against the defendant, in an action for libel upon the same letter. To the count for slander he pleaded a traverse of the speaking of the words; a traverse of the words having been spoken concerning the plaintiff’s election to the office of poor-rate collector,

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and privileged communication. The action was tried before the LORD CHIEF BARON and a special jury, at the Sittings after Easter Term 1863. The plaintiff stated that the charge of two shillings for the seizure which he made in Belford's house, before payment of the poor-rate was tendered, and two shillings for each of the bailiffs, was so authorised by the schedule to the 9 & 10 *Vic.*, c. 111. His Lordship was of the same opinion. The results which flowed from the writing of the letter in question by the defendant appeared from the following minutes of the proceedings of the Clonmel Board of Guardians:—"3rd April 1862: letter from the Poor-law Commissioners, 2nd April 1862, forwarding, to be laid before the board, "a copy of a letter which they had received from Mr. Coates, agent "to Lord Stradbroke, complaining of a seizure made by Mr. Pope, "poor-rate collector, on a holding in the possession of a caretaker of "his lordship, requesting that an immediate explanation might be "obtained from the collector on the subject, and forwarded to them. "Mr. Pope, who was in attendance, having been called on for an "explanation, informed the board that the tenement upon which "the seizure was made was described in his collecting book as in "the occupation of James Belford, which the board, on reference "to the rate-book, found to be the case, and that, previous to the "seizure, he had demanded the rate. The Poor-law Commissioners "thereupon directed William Hamilton, Esq., one of the inspectors, "to inquire into the complaint made by the defendant against the "plaintiff. The investigation was held on the 17th of April 1862."

Minute of the 8th of May 1862:—"Letter from the Poor-law "Commissioners of 7th of May 1862, in reference to the recent "investigation held into complaint made against Mr. Pope, poor-rate collector, by Messrs. Coates and Charles Acheson, stating, "in respect to the former, there appears to be no doubt from the "evidence that in levying the distress Mr. Pope was actuated by "personal feelings of animosity against Belford; but that, in "Mr. Acheson's case, Mr. Pope was not bound to call on him "again for payment of the rate, considering that he had previously made application for it. That in both, as well as in "other cases, excessive and illegal charges were made by the col-

“lector; that private feelings and ill-temper cannot be permitted
 “to influence poor-rate collectors in the exercise of their legal
 “powers; nor can the enforcement of exorbitant demands for
 “levying distresses in such cases be allowed; and, were it not
 “that Mr. Pope has ceased to be an officer of the union, the
 “Commissioners would not hesitate to remove him from office
 “by an order under their seal; and, should he again be elected
 “to hold any office under the poor-laws, the subject of these
 “complaints would be reviewed by the Commissioners.”

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The plaintiff had resigned the office of poor-rate collector in 1861, immediately after he had been fined for trespassing in pursuit of game.

At a meeting of the Clonmel Board of Guardians, upon the 29th of May, when it was determined to advertise for poor-rate collectors, it was further resolved—“That, as advertisements are
 “about to be published for the appointment of poor-rate collectors
 “for this union, the Guardians, referring to the letter of the
 “Commissioners, dated 7th of May, as regards collector Pope, who
 “has been a most efficient and useful officer, are desirous to
 “have the Commissioners’ opinion as to his qualification for re-
 “election, as the decision of the Commissioners would be likely to
 “influence many Guardians in the selection they would make
 “on the occasion.”

Minute of the 12th June 1862:—“Letter from the Poor-law
 “Commissioners stating, with regard to Mr. Pope’s qualification
 “for the office of poor-rate collector, that, owing to the un-
 “favourable nature of the circumstances which transpired at the
 “recent inquiry into his conduct, the Commissioners would not
 “be prepared to sanction his appointment: also transmitting a
 “copy of a letter from Mr. Pope, and of their reply thereto. And,
 “with respect to Mr. Pope’s assertion, that fees in accordance with
 “the schedule to the 9 & 10 Vic., c. 111, are always charged by the
 “collectors in the union, requesting that the Commissioners may
 “be furnished with the observations of the Guardians on the
 “subject, as they are prepared to dismiss from office any collector
 “who may have been guilty of making such exorbitant and

E. T. 1863. "illegal charges,—it was resolved, that the Commissioners be
Exchequer. "informed that it is the opinion of the Board, that such over
 POPE "charges were not made knowingly in any case by the collectors
 v. "in this union.
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Minute of the 12th of June 1862 :—"The re-election of Mr. Pope for the No. 4 collecting district was then proposed by G. T. Cantwell, Esq., and seconded by J. Prendergast, Esq., and the question having been put from the chair, was carried *nem. con.*; but at the same time, the board were unanimous in expressing their disapproval of the conduct of Mr. Pope, which formed the subject of the late investigation at the board-room, and the necessity for cautioning him against any repetition of it."

The Guardians of the Clonmel Union met upon the 19th of June 1862, to confirm the plaintiff's election to the office of collector, in case the Poor-law Commissioners would sanction it. When the board met, the clerk of the union read a letter from the Commissioners, refusing to sanction the plaintiff's election. One of the guardians, who had not been present at the former meetings of the board, said that he would like to hear the contents of the letter which the defendant had written to the Commissioners. The clerk thereupon read the letter aloud. This was the publication complained of by the plaintiff.

Minute of the 19th of June 1862 :—"Letter from the Poor-law Commissioners of the 15th of June, in reference to the re-election of Mr. Pope to the office of poor-rate collector in this union, stating that they cannot consider him to be a fit person for the office, declining to sanction his appointment, and requesting that the necessary steps might be taken towards the appointment of another collector in his place. It was unanimously resolved, that the board having had under their consideration the letter from the Poor-law Commissioners relating to the appointment of Mr. Pope as rate collector, and declining to ratify said appointment, the board trust that they may not be deprived of the services of Mr. Pope, which have been so advantageous to the Union. The board, having already seriously admonished Mr. Pope, are of opinion

“that no further irregularities on his part are likely to occur; E. T. 1863.
 “the Board further beg the Commissioners to take into their *Eschequer.*
 “consideration the excellent collections that have been made by POPE
 “Mr. Pope, the full amount of his warrant having been always v.
 “paid up, which was far from the case under other collectors. COATES.

Minute of the 26th of June 1862:—“Letter from the Poor-law
 “Commissioners, of the 25th of June, in reference to the appoint-
 “ment of Mr. Pope to the office of poor-rate collector, stating that
 “they cannot, for the reasons stated in their letters of the 7th and
 “5th instant, consistently with their sense of duty, sanction Mr.
 “Pope’s appointment, and requesting that the Guardians will take
 “the necessary steps towards the appointment of another collector
 “in his place.”

Upon the 10th of July 1862, the Board elected another person
 as collector, in the place of the plaintiff.

The jury found that the defendant’s letter was a libel, and
 had been published by the defendant as alleged; and gave £50
 damages, contingently upon the decision of the Court above. They
 also found that the defendant had uttered the slander in reference
 to the plaintiff’s election to the office of poor-rate collector, and
 gave sixpence damages.

His Lordship ruled that the charges made by the plaintiff upon
 Belford, for the seizure and the bailiffs, were legal.

At the close of the case, Counsel for the defendant called upon
 his Lordship to tell the jury, first, that the words spoken of the
 plaintiff were not any ground of action, unless the jury were of
 opinion that those words were the immediate and direct cause of
 the plaintiff’s being deprived of his office of collector; secondly,
 that if the defendant’s object in writing the letter to the Com-
 missioners was to have the plaintiff dismissed for his misconduct
 in making the distress, although he had also the second object of
 getting rid of the plaintiff’s poaching, the existence of this latter
 object would not deprive the defendant of protection so far as it
 rested on the absence of malice; thirdly, that the averment of the
 defendant’s belief of no previous demand of the poor-rate having
 been made from Belford was not material.

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His Lordship declined to accede to any of the above requests.

Pursuant to leave reserved at the trial, conditional orders were obtained by the plaintiff and by the defendant: by the plaintiff to have the verdict entered for him with £50 damages; by the defendant to have the verdict entered for himself.

May 7.

Sergeant *Armstrong*, *C. Hemphill*, and *Tandy*, for the defendant, now showed cause against the plaintiff's conditional order.

The Poor-law Commissioners, who copied the defendant's letter, were the persons who published the libel upon the plaintiff, if libelled he be. The communication from the defendant to the Commissioners was privileged; but that from the latter to the Guardians was not privileged. The damage is too remote: *Sandwell v. Sandwell* (a); *Rex v. Bear* (b); *Reg. v. Lovett* (c); *Ward v. Weekes* (d); *Parker v. Scott* (e); *Mayne on Damages*, p. 275; *Smith v. Wood* (f).

Thomas Harris, with whom were *C. Shaw*, *Purcell*, and *Hackett*, contra.

Coates published the libel when he wrote to the Commissioners. His letter was not a privileged communication: *R. v. Burdett* (g); *Johnson v. Hudson* (h); *Tarpley v. Blakey* (i); *R. v. Harvey and Chapman* (k); *The Trial of the Seven Bishops* (l); *Bac. Abr. Libel*, B, 2; *R. v. Lovett* (m).

The defendant is liable to an action for every publication of the the libel: *R. v. Carlisle* (n); *The Duke of Brunswick v. Harmer* (o) *Frescoe v. May* (p).

Hemphill, in reply.

(a) Holt, 296.

(c) 9 Car. & P. 462.

(e) 31 Law Jour., Exch. 331.

(g) 4 B. & Add. 95.

(i) 2 Bing., N. C. 437.

(l) 12 State Trials, 183.

(n) 1 Chitty, 451.

(b) 2 Salk. 417; S. C. 1 Lord Ray. 414.

(d) 7 Bing. 211.

(f) 3 Camp. 323.

(h) 7 Ad. & Ell. 233, note.

(k) 2 B. & C. 25.

(m) *Supra*.

(o) 14 Ad. & Ell. 185.

(p) 2 Fost. & Fin. 123.

PIGOT, C. B.

I am of opinion that the cause shown against the conditional order to enter the verdict for the plaintiff should be disallowed. The defendant wrote a letter to the Poor-law Commissioners containing certain charges against the plaintiff, who was a collector of poor-rates, and demanding an inquiry into his conduct, with a view to his immediate dismissal. The Poor-law Commissioners communicated with the Guardians of the Clonmel Union; and the result was, that an inquiry into the conduct of the plaintiff was directed by the Commissioners to be held by one of the Poor-law Inspectors, and was accordingly held. The letter written by the defendant to the Commissioners furnished the materials for that inquiry. The Guardians of the Clonmel Union, being desirous that the plaintiff should not be dismissed, wrote in his favour to the Commissioners, and represented to the Commissioners the punctuality with which he paid in the amount of his collections. The letter from the Commissioners to the Guardians contained grave charges against the plaintiff—first, for distraining goods, in a certain case, in violation of the Act of Parliament; secondly, for exacting costs to which he was not entitled. As to the first charge, the Guardians stated that the plaintiff had expressed his regret, and had apologised. As to the second charge, the Guardians stated that the plaintiff was scarcely to blame, as it had been the habit of the collectors who had preceded the plaintiff to demand, in the enforcement of poor-rate, the same amount of costs as that demanded by the plaintiff. The first of these charges had been put forward directly in the defendant's letters to the Commissioners; the second, indirectly. Here, then, we have a letter demanding an inquiry into certain charges, with a view to the immediate dismissal of the plaintiff; an inquiry held accordingly; and a communication thereupon made by the Commissioners to the Guardians. Coates the defendant must have known that the appointment to the office of collector of poor-rate for the Ballymacarbry district lay with the Guardians. The plaintiff had ceased to be collector. He could only be "dismissed" by a step which would prevent his re-election to the office; which re-election did actually take place in the month

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of June. The correspondence between the Guardians and the Commissioners continued for some time; the former desiring to retain the plaintiff in his former office by re-electing him; the latter objecting to his re-election, that is, in effect desiring his removal from the office. The re-election of the plaintiff to the office could not have been prevented by the Commissioners without some communication made by them to the Guardians, stating the reasons which led them to forbid the plaintiff's continuance in office, or re-election to the office of collector; and the inquiry sought by the defendant, as the preliminary to the dismissal of the plaintiff, could not have been had without the statement of the charges on which the inquiry should take place. It was impossible in effect for the Commissioners to prevent his re-election without communicating the letter written by the defendant to the Guardians. It must have been in the contemplation of the writer of that letter that it would be so communicated; and if so, that it must be read by or to the Guardians, and would be referred to; and if so, the reading of that letter by the clerk, the chairman, and the Guardians—each of which was a publication—must have been contemplated by the writer as the natural result of the writing and sending of the letter to the Commissioners.

Under these circumstances I am of opinion that there was evidence of publication by the defendant of the letter, and that a verdict, with the damages found for the plaintiff, should be entered for him.

FITZGERALD, B.

I concur, but wish to be understood as giving no opinion as to the legality or illegality of the fees demanded by the plaintiff.

DEASY, B.

When the defendant wrote the letter the subject of this action, to the Commissioners, he must have known that the latter body would, as a matter of course, communicate its contents to the Guardians. I was at first struck with the length of time which elapsed between the writing of the letter and the non-election of the plaintiff; but, on looking through the minutes of the meetings

of the Guardians, I cannot say that there was not reasonable evidence upon which the jury might have found that the reading of the letter at the Board was the reasonable consequence of the sending of the letter by Coates. The appointment of a collector did not take place until the 29th of May. The Guardians then consulted the Commissioners. Upon the 19th of June the defendant's letter was read at the Board. The final decision was not come to until the 10th of July. Looking, then, at the dates, and the continuous correspondence which took place, I cannot say that the reading of the letter by the chairman was so remote in its consequences as not to justify the learned Judge in sending the case to the jury, and not to warrant the jury in finding as they did.

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The case came before the Exchequer Chamber, on appeal, on the 25th of April 1865.

Exchequer Chamber.*

COATES, plaintiff in error; POPE, defendant in error.

Sergeant *Armstrong*, *Hemphill*, and *Tandy*, for plaintiff in error, cited *Avery v. Boden* (a); *Ward v. Weskes* (b); *Smith v. Wood* (c); *Tidman v. Ainslie* (d); *Parkins v. Scott* (e); *Knight v. Lynch* (f); *Duke of Brunswick v. Harman* (g); *R. v. Allman* (h).

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T. Harris, *C. Shaw*, *Purcell*, and *J. W. Harris*, for the defendant, cited *Johnson v. Hudson* (i); *Rez v. South* (k); *R. v. Bennett* (l); *Bac. Abr., Libel*, B, 12; *Starkie on Libel, Preliminary Discussion*, p. 75.

(a) 6 Ell. & B. 973.

(b) 7 Bing. 211.

(c) 3 Camp. 323.

(d) 10 Exch. 63.

(e) 1 H. & Colts. 153.

(f) 9 H. of L. Cas. 577.

(g) 14 Q. B. 185.

(h) 5 Burr. 2086.

(i) 7 Ad. & Ell. 233, note.

(k) 9 Car. & P. 462.

(l) 4 B. & Ald. 86, 135.

* *Coram* LEFFROY, C. J., MONAHAN, C. J., KEOGH, CHRISTIAN., O'BRIEN, HAYES, FITZGERALD, and O'HAGAN J. J.

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April 25.

LEFROY, C. J., pronounced the judgment of the Court:—

After a careful consideration of this case, we have unanimously arrived at the conclusion that the decision of the Court of Exchequer should be overruled. While we are unanimous in our conclusion, the grounds upon which the Members of this Court have arrived at that conclusion differ slightly. The ground upon which the majority of my Brethren, including myself, base our judgment is, that we do not think that there was any evidence to connect the defendant with the publication of the libel in question. The defendant has suffered already for one publication of the letter containing the alleged libel; and he has paid the penalty for his conduct. Is he to suffer for a second publication, with which there is no evidence to connect him? There is nothing in the language of the letter to encourage a repetition of the publication. There was nothing in the letter to necessitate or call for its being read again. The letter in question was sent to a public body—the Guardians of the Clonmel Union; and it was intended that it should remain in the archives of that public body when they had made the use of it which the defendant intended they should. But, at the desire and instance of one of the Guardians of the Clonmel Union, who was not present at the first reading of the letter, it was removed by the servant of the Guardians from the archives of the union, where it should have remained for ever. That second reading became thereupon a new and different publication, connected neither directly nor indirectly with any act of the defendant. There is nothing to make him answerable for the second, publication nor is there any substantial ground, in my opinion, for inflicting a second punishment upon him.

Verdict to be entered for defendant.

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Queen's Bench

SIR CHARLES C. W. DOMVILE, Bart., and others,

v.

JOHN BRACK.*

(*Queen's Bench.*)

Jan. 19.

EJECTMENT ON THE TITLE.—This was a motion to compel the defendant to give security for damages, mesne profits and costs, pursuant to the 23 & 24 *Vic.*, c. 154, s. 75. The only question in the case was, whether the agreement set forth below was a “lease or other instrument regulating the terms of the tenancy,” within the meaning of the Act?

“Memorandum of agreement, made the 1st day of January 1859, “between Sir Charles C. W. Domville, of Santry-house, in the “county of Dublin, Bart., of the one part, and John Brack, of “Rathmichael, in the county of Dublin, yeoman, of the other part.”

“The said Sir Charles C. W. Domville doth hereby agree to “let, and the said John Brack doth hereby agree to take, all that “and those that part of the lands of Rathmichael, now in his possession, situate in the barony of Rathdown and county of Dublin, “containing 11a. 0r. 27p., or thereabouts, I. P. M., and bounded on “the west and north by part of the lands of Ballycorus, and part “of said lands of Rathmichael held by John Doyle, and on the east by part of said lands of Rathmichael held by John Doyle and Felix “Hughes, and on the south by part of said lands held by Felix “Hughes: To hold from the 29th day of September 1858, as tenant “from year to year, and to pay therefor to the said Sir C. C. W. “Domville, his heirs and assigns, the yearly rent of £12, by *quarterly* “gales, on every 25th day of March, &c., during the continuance of “such tenancy. And it is hereby agreed that the said John Brack, “his executors and administrators, shall and will, from time to time, “upon getting *one month's* previous notice in writing thereof from

Under the 75th section of the Landlord and Tenant Act, defendant will not be required to give security for costs unless there is an “instrument in writing,” binding upon both parties.

Semble (per HAYES, J.)—That the power to compel security for costs, &c., being discretionary, will not be exercised by the Court, where the terms of the alleged instrument are oppressive.

* Before the Full Court.

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"the said Sir C. C. W. Domvile, his heirs or assigns, by service
 "of such notice upon him or them, or delivery thereof at his or
 "their usual or last known place of abode, surrender and yield
 "up to him or them, at the termination of any current quar-
 "ter, full possession of the whole, or such part or parts of said
 "lands and premises, to the said Sir C. C. W. Domvile, his heirs or
 "assigns, as he or they shall from time to time require, and shall
 "and will thereupon pay and discharge all rent due in respect of
 "said premises."

"And it is further agreed between the parties aforesaid that, in
 "case the said John Brack, his executors or administrators, should
 "make default in delivering up possession of the whole or any part
 "of the said lands, as hereinbefore agreed on, after such notice
 "being given to the said John Brack, or left at his usual or last
 "known place of abode as aforesaid, that then it shall and may
 "be lawful for the said Sir C. C. W. Domvile, his heirs or assigns,
 "immediately, from time to time, upon such demand of possession,
 "and default made in delivering up same, to enter into the actual
 "possession of said lands and premises, in like manner as if a writ
 "of *habere* had been issued, and to plead this agreement as a license
 for that purpose."

"And, lastly, that the right to shoot and kill rabbits, quail, and
 "all sorts of game, on the said lands, shall be reserved and exclu-
 "sively belong to the said Sir C. C. W. Domvile, his appointees, his
 "heirs and assigns."

This agreement was not executed by Sir Charles Domvile.

W. O'Connor Morris, for the plaintiff.

The defendant has not denied that he held and enjoyed the lands under this agreement, nor sworn that he has any defence on the merits; and the statute being a beneficial one, both to the landlord and to the tenant, the Court will not speculate on the agreement, provided only that it be within the statute. The 1 G. 4, c. 87, is *in pari materiâ* with the present Act, except that the subject-matter of the old Act was a lease or agreement in writing. But, under the 1 G. 4, c. 87, proof of execution of the instrument was

necessary, just as it is under the modern statute. Under the 1 G. 4, c. 87, it might have been argued that a deed or agreement, executed by one party only, was not within that Act, for want of mutuality: 2 *Fur. Landlord and Tenant*, p. 1054. Though the old statute used the word "agreement," yet a mere unaccepted proposal, at least if acted on by possession, was within that Act: *Jack v. Lynch* (a); *Doe v. Roe* (b).—[HAYES, J. There is an *Anonymous case* in 1 *Law Rec.*, p. 342, which shows that a mere entry under an instrument, and payment of rent under it, is not sufficient where the instrument has not been executed by the landlord.]—That case should not rule the present one, because it was an executed contract for a term of an uncertain duration, which would not be within the Act; and there was possession collateral with the contract.—[FITZGERALD, J. It has been decided that the agreement must be in writing. Is this instrument, which has not been executed by the landlord, an agreement in writing?—Under the 75th section a *lease* must be executed by both parties; but a contract need only receive that execution which is necessary to give it legal validity.—[FITZGERALD, J. That would appear to me to be the signature of the vendor, the person *from* whom the term moves.]—If this instrument be a lease for a year, it might have been made by parol.—[FITZGERALD, J. Could not an ejectment have been brought at any time against this tenant?—Yes.—[FITZGERALD, J. Here the tenure flowed, not from the instrument, but from the payment of rent; and therefore the instrument did not "regulate the terms of the tenancy."]

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Dillon, contra.

Security for costs, under this Act, can be required only in a case which is clearly and unquestionably in favour of the landlord. But where there is a question for the jury, security for costs need not be given: *Hutchins v. Vaughan* (c), *Pentland v. Murtagh* (d); *Beakey v. Murphy* (e); *Pitman v. Woodbury* (f).

(a) 1 J. & Sy. 403.

(b) 5 B. & Ad. 770.

(c) 11 Ir. Com. Law Rep. 351.

(d) 12 Ir. Com. Law Rep., App. xi.

(e) 8 Ir. Jur., N. S. 161.

(f) 3 Exch. Rep. 4.

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Morris replied.

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LEFROY, C. J.

BRACK.

I have already expressed my view of the nature and requirements of this Act, which creates a new and stringent mode of proceeding to give to the landlord in an action of ejectment security for his rent and costs. The Legislature has guarded that right by requiring that there shall be an instrument in writing which ascertains the rights of the parties; that is to say, an instrument binding upon both parties, and therefore virtually under the hands of both, and ascertaining their mutual rights, because the landlord has the same rights as he has in any other case, while the tenant is subject to a burden to which he would not be subject in any other case. And there is good sense and justice in requiring that, where there is something very nearly approaching to certainty that the tenant, confessing the landlord's right to the rent, endeavouring to delay his assertion of that right, should not be allowed to do so except upon the production of the instrument which would *prima facie* and by virtue of itself ascertain the rights between the parties. I should, therefore, think that in this case, where there is nothing in writing to bind the landlord, the security cannot be required, however there might be under other statutes sufficient to bind the party, as in the case of a proposal by the tenant under which the landlord allows him to go into possession: that would be a very good case under the Statute of Frauds. But the question is, whether under *this* statute a sufficient case has been made to entitle the landlord to obtain the security which need not otherwise be given? I think that the policy of this Act requires the landlord to make out a *prima facie* case and right before the tenant can be compelled to give security for the rent and costs; and therefore I am of opinion that this motion must be refused.

O'BRIEN, J., concurred.

HAYES, J.

This is an application made to prevent this tenant from exercising his common law right to defend the action in which

he has been sued, unless and until he shall give security for rent and costs; and, such an application being in restriction of a common law right, it is not too much to ask that the statute under which it is made shall be complied with both in letter and spirit. Has there, then, been in this case such a compliance with the statute? The Legislature, as I read the statute, never intended to deprive the tenant of his right of making a defence unless it should appear clearly to the Court that no question was likely to arise upon the trial. On this motion the landlord is bound to show not only what was the interest which passed to the tenant; but that that has been effected by the production of a written instrument, completed so as unmistakably to regulate the tenancy. It cannot be done by showing that a proposal has been made by the tenant to the landlord to take land, and then endeavouring to make out an adoption of that proposal by the landlord from the tenant's being permitted to remain in possession and paying rent. There ought to be no doubt or question either as to what the tenant intended to take, or what the landlord intended to give. I consider the case (a) before Pennefather, B., as quite in point with the present. But there is another question behind. And though the objection I have just mentioned were got over, still I would not be disposed to yield to this application. I do not think that the document relied on is of such a nature that we ought to deprive a tenant of the power of making every defence which the circumstances of the case would admit. By it, the defendant proposes "to hold from the 29th day of September 1858, *as tenant from year to year*, and to pay therefor "to the said Sir C. C. W. Domville, his heirs and assigns, the "yearly rent of £12, by *quarterly* gales, on every 25th day of "March, &c., during the continuance of such tenancy." These words I think would plainly convey, that if the tenant should, in any year, be allowed to continue in possession after the 29th of September, he might calculate on holding for the remainder of the year, if prepared to pay his rent as it became due, and in this confidence he might cultivate and sow his land; but such would not appear to be the intention of the landlord who has extracted

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(a) 1 Law Rec. 1st Series, 342.

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this proposal from him, and whose instrument I take it to be, having been filled up from one of the landlord's blank forms. For the document goes on to provide that the tenant, "upon getting *one month's* previous notice in writing" from the landlord, "by service "of such notice upon" the tenant, "at his usual or last-known "place of abode, will surrender and yield up to" the landlord, "at "the termination of any current quarter, full possession of the "whole, or such part or parts of said lands and premises, to" the landlord, as he shall from time to time require, and will thereupon pay and discharge all rent due in respect of said premises.

This clause would seem to reserve to the landlord a power, no matter how punctually the rent has been paid, or how well the land has been cultivated, of putting an end to the tenancy just when the appearance of the crops had given the tenant hopes of a plentiful and profitable harvest. This appears to me so radically unjust, that I feel disposed to give no encouragement to the landlord, and would forbear to exercise a judicial discretion in his favour when seeking to enforce such an instrument.

This motion must be refused with costs.

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Queen's Bench

FRANCIS WAKEFIELD

v.

JOHN SMYTHE AND EMILY SMYTHE.*

June 10, 11,
 24.

DEMURRER.—Ejectment for non-payment of £478. 16s. 0d., being one year's rent, due and ending on the 1st of May 1864, of part of the lands of Rogerstown, in the barony of Balrothery East, in the county of Dublin, and of the dwelling-house and offices thereon, which the defendant held as tenant from year to year.

The bill of particulars indorsed on the plaint was for :—

One half-year's rent due on the 1st of November 1863,	£239	8	0
One half-year's rent due on the 1st of May 1864	...	239	8 0
		<hr/>	
Total	...	£478	16 0

The defendant John Smythe filed several defences, the second of which was the following :—That after the first half-year's rent indorsed on the plaint became due, to wit, on the 25th of December 1863, the plaintiff in this action issued a plaint against the now defendants for the sum of £638, payable by them to the plaintiff for their use and occupation by the plaintiff's permission of certain lands, messuages and premises of the plaintiff; and that amongst other items indorsed on that plaint was this :—"1863, Nov. 1. "To half-year's rent due on this day, £239. 8s. 0d." The defence, having averred the identity of the lands, messuages and premises in the two actions, and of the sum of £239. 8s. 0d. indorsed on the

*Transit in rem
 judicatum.*

A. brought an ejectment for non-payment of rent. Comprised in the bill of particulars was one half-year's rent due on 1st of November 1863. The defendant pleaded that after said half-year's rent became due, the plaintiff had brought an action for money due for use and occupation of the said premises, and had indorsed the said item in the writ in that case, and had recovered judgment in said action for the sum of, &c., which included the said first item in the plaintiff's second

writ, that execution had been had thereon, and the Sheriff had paid into Court £125. 3s. 3d., which the said defendant was entitled to have applied in part satisfaction of the aforesaid judgment. The plaintiff demurred.

Held, that the defence was bad.

Held (by FITZGERALD, J.)—That the remedies of a landlord by personal action for non-payment of rent, and by ejectment for the same cause, are distinct, and not co-extensive.

Held also (by FITZGERALD, J.)—That the principle *transit in rem judicatum* only affects a merger of the remedy and does not destroy the right of action.

Quære (by FITZGERALD, J.)—Whether, under *Armstrong v. Turquand* (9 Ir. Com. Law Rep., p. 32), the Court can on demurrer look at a judgment and bill of particulars not set out on the record?

* Before O'BRIEN and FITZGERALD, J.J.

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first plaint, with the first item indorsed on the plaint in the present action, set forth *seriatim* the proceedings in the first action down to recovery of judgment by the plaintiff for a sum of £434. 18s. 6d., with sixpence costs, as found by the jury, together with £89. 1s. 11d. for costs, making together the sum of £524. 0s. 5d.; and averred that that sum included the sum of £239. 8s. 0d., being the first item indorsed on the plaint in the present action; that on the 24th of March 1864, a writ of *fi. fa.* was issued and delivered to the Sheriff directing him to levy the said sum of £524. 0s. 5d., with interest at £4 per cent., for the plaintiff's debt, costs, and interest; that the Sheriff by virtue of that writ seized the defendants' goods to the value of £125. 3s. 3d.; that the Sheriff, before the commencement of the present action, filed his return stating the levy of that sum, of which he paid £1. 6s. 0d. for poor-rate, and lodged the residue in Court, and that the defendants had no more goods in his bailiwick; and the defence then concluded with a general averment of the performance of all conditions precedent entitling the defendant John Smythe to have the said sum of £125. 3s. 3d., so levied aforesaid, applied in part satisfaction of the aforesaid judgment.

To this defence the plaintiff demurred.*

O'Driscoll and Sidney, for the plaintiff.

The defence does not sufficiently show an appropriation of the sum levied in part satisfaction of the half-year's rent due on the 1st of November 1863: *Simson v. Ingham* (a); *Peters v. Anderson* (b);

(a) 2 B. & Cr. 65.

(b) 5 Taunt. 596.

* These points of demurrer were noted for argument:—First; that the second defence was not an answer in law to the action.

Second; that there is nothing in the second defence to show that a year's rent of the premises was not due at the commencement of this action.

Third; that, whilst the second defence avers that one year's rent was not due as aforesaid, the said defence in effect discloses facts which show that it was due at the commencement of the suit.

Fourth; that there is nothing in the second defence to show that the judgment therein referred to was recovered for the rent indorsed on the summons and plaint.

Fifth; that, assuming that the said judgment was recovered in fact for the same rent, it is no legal answer to this action.

Sixth, that the second defence is defective in substance.

Arnold v. The Mayor of Poole (a); *Williams v. Griffith* (b). T. T. 1864.
 The principle of *transit in rem judicatam* does not apply: *Drake v.*
Mitchell (c); *Lessee of Trant v. Fogarty* (d); *Rush v. Purcell* (e). Queen's Bench
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Palles and Sergeant *Armstrong*, contra.

To sustain an action of ejectment for non-payment of rent, it must be shown that one year's rent is due. If any part of the half-year's rent due on the 1st of November 1863 was paid, one year's rent does not remain due. An action of ejectment for non-payment of rent does not lie for rent which was sued for in a previous action in which judgment was recovered; at all events, not after an execution levied, in which case the matter has become a *res judicata*. None of the cases cited in support of the passage in Mr. *Furlong's* work go nearly far enough to sustain his broad proposition. In *Drake v. Mitchell* a single debt had been secured by two independent securities; and it was well held, that a recovery upon one of the securities did not prevent an action upon the other, which had not merged. The second case cited by Mr. *Furlong* is *Twopenny v. Young* (f). But there the bill of sale was merely a further security, and so did not extinguish the remedy on the promissory note, which was the pre-existing security. Since the publication of Mr. *Furlong's* treatise, the case of *King v. Hoare* (g) has placed the law on a different footing. The decision in that case was grounded on the proposition, that the recovery of a judgment is an extinguishment of the debt sued for; which being extinguished, the creditor cannot again sue the persons liable upon the debt, although his remedy upon it would be larger than that on the judgment. That case was considered in, and affirmed by the case of *Ex parte Higgins, in re Tyler* (h). The case of *Rush v. Purcell* was a decision of a single Judge, and rests on the authority of *Drake v. Mitchell*; but the grounds

(a) 4 M. & Gr. 860.

(b) 5 Mee. & W. 300.

(c) 3 East. 251.

(d) Batty's Rep. 15, n.

(e) 3 Cr. & Dix. Cir. Cas. 162; 2 Furl. L. & T. pp. 1151 to 1157.

(f) 3 B. & Cr. 288.

(g) 13 Mee. & W. 494.

(h) 3 De. Gex. & Jones, 33.

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on which it is based have been completely distinguished by the cases of *Ex parte Higgins* and *King v. Hoare*.

Since the passing of the Common Law Procedure Amendment Act (Ireland), the action of ejectment for non-payment of rent has become an action for, not only the recovery of the premises, but also the amount of the rent. No man can have at law two remedies to effect the same end. But judgment for the half-year's rent due on the 1st of November 1863 has already been recovered: *Percival v. Dunne (a)*.

The second question touches the partial levy under the judgment in the former action. How is the money so levied to be applied? The debtor, if he paid the money, could appropriate it as he pleased. That rule does not apply when the Sheriff's hand pays the money. The debtor cannot in that case direct how the money shall be appropriated, because it is paid by process of law. The Sheriff, being only a ministerial officer of the law, directed to levy the money on foot of the judgment generally, cannot appropriate it. Neither can the plaintiff appropriate it at his option; for his right to appropriate it can only exist in default of the exercise by the defendant of his right of appropriation, which right he has not in this case.

Sidney, in reply.

When an instrument of demise is more than a year old, the whole year's rent is presumed to be due, unless the defendant satisfies the Court that he has paid the entire or part of the rent. Thus, the defendant must show here that he has paid all or part of the half-year's rent due on the 1st of November 1863; otherwise the Court will presume that it is all due. The marginal note to *King v. Hoare (b)* shows that that case does not apply. If the plaintiff recovered two judgments for the same rent, he would not be allowed to execute both; or at least would be liable to suffer personal damages if he did levy under both judgments.

Cur. adv. vult.

(a) 9 Ir. Com. Law Rep. 422.

(b) 3 Mee. & W. 494.

O'BRIEN, J., pronounced judgment in favour of the demurrer.

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June 24.

FITZGERALD, J.

I concur with my Brother O'BRIEN. The plea is in a shape which plainly points out that the defendant intended to rely upon the defence that there had been a part satisfaction of the half-year's rent due on the 1st of November 1863, by the appropriation to that half-year's rent of part of the sum levied under the judgment recovered in the first action. That defence was disposed of in the course of the discussion; and I will not now advert to it further, save to point out that it was not necessary to travel out of the record at all. Sufficient was stated in the pleadings to raise the question; and I do not desire to express an opinion that the effect of the decision in *Armstrong v. Turquand* (a) is to be enlarged, so as to enable us to look at a judgment and a bill of particulars not stated on the record. But the defendant's Counsel then contended that the effect of the recovery of the judgment in question was, to extinguish that half-year's rent due on the 1st of November 1863, so as that it could no longer form the foundation of this action of ejectment. He relied upon the application of the principle, *transit in rem judicatam*; and he further contended that this pending action is a distinct action—a second action, brought for the recovery of the same half-year's rent. This second argument presented a double aspect. The action was instituted, not under the old Ejectment Statutes, but under the 24 & 25 Vic., c. 154, s. 52, which confers on the landlord a new remedy, and enables him to proceed by ejectment for the recovery of the land held under a tenancy from year to year, whether with or without any written agreement, “whenever a year's rent shall be in arrear.” It is not necessary to discuss the sections between the 52nd and 56th, save to point out that one of their general objects was, to compel the landlord to state the particulars of the rent due, so as to enable the tenant to redeem; and that the writ of *habere*, when being executed, should contain an indorsement of the sum due; so that the tenant could even then get rid of the claim by paying it. The 66th deserves especial notice. That section provides that

(a) 9 Ir. Com. Law Rep. 39.

T. T. 1864. "Every landlord recovering possession by such judgment or decree,
Queen's Bench
 WAKEFIELD "in any ejectment for non-payment of rent, shall have the same
 v. "remedy for all arrears of rent to the time of the execution of
 SMYTHE. "such judgment or decree as such landlord might have had if
 "possession had not been obtained under such judgment or decree."

When the tenancy is not disputed, the question seems to be, whether one full year's rent was due to the landlord at the time of bringing the action, and still remains due? And that is the question now attempted to be raised. The defendant is therefore bound to show that, on the facts stated in the pleadings, one full year's rent did not remain due to the plaintiffs. In support of that defence he relied principally on *King v. Hoare* (a). But that was not an authority ruling the present case, though no doubt it was of value, from the observations made by the Judges. *King v. Hoare* was merely an application of an old rule of law to a new state of facts. The plaintiff in that case, having in a former action obtained judgment against one of two joint contractors, could not be permitted, in a second action against the other, to deprive him of the right to plead in abatement the nonjoinder of his co-contractor; and the plaintiff never could have had a better writ, because he had already obtained judgment against the other co-contractor, and could not have two judgments against him.

There is in the report a good deal of observation to be found, which is very valuable in the present case. The effect of the application of the rule *transit in rem judicatam*, as Mr. Baron Parke showed, was not to extinguish the debt, but simply to merge the remedy:—"If there be," he said, "a breach of contract, or wrong done, or any other cause of action, by one against another, and judgment be recovered in a Court of Record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit, for the purpose of obtaining the same result. Hence the legal maxim "*transit in rem judicatam*;"

(a) 13 Mee. & W. 494.

"the cause of action is changed into matter of record, which is of a higher nature; and the inferior remedy is merged in the higher."

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The right which the recovery of a judgment gives to have an execution, merges the inferior remedy; and obviously so, because it would be absurd that a party, having got a right to an execution for a single debt, should institute another action, and proceed to judgment and execution for the same cause of action over again. That decision therefore is, not that the judgment operates as a satisfaction or extinguishment of the debt, but simply that it operates as a merger of the remedy; because the plaintiff has already got the highest remedy, and should not be permitted to look for an inferior remedy, or one merely co-extensive: *Ex parte Higgins (a)*, following out, though under different circumstances, the former case of *King v. Hoare*. The statement of the effect of that case by Lord Justice Knight Bruce is inaccurate. He puts it that, after the recovery of judgment against one of two joint contractors, the debt is gone. That is not so. He was followed by Lord Justice Turner, who puts it upon the true ground, not that the debt is extinguished, but that the remedy is gone. When judgment is recovered for a debt, the language of the law is, "*transit in rem judicatam*." But that does not import that the debt is extinguished or satisfied; and its true limit and meaning seems rather to be that, having pursued the remedy given by the law, and obtained judgment and a right to execution, you cannot have a second suit for the same remedy." Accordingly, I adopt the language of Lord Ellenborough, in *Drake v. Mitchell (b)*, when he says, "I have always understood the principle of *transit in rem judicatam* to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy, from its being of a higher nature than before." It seems to me therefore that the mere recovery of judgment in an action for rent does not merge or extinguish the rent, or so affect its character as to prevent the landlord from maintaining, under the 24 & 25 Vic., c. 154, an action of ejectment, to recover possession of the lands in respect of the same rent.

(a) 3 De G. & J. 33.

(b) 3 East, 258.

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The passage cited from 2 *Furl.*, p. 1156, shows that such was the generally received opinion of the Profession at the time when Mr. *Furlong* wrote, even when an action of ejectment was instituted under the old Ejectment Statutes. No doubt the authorities referred to by him do not, as matters of decision, establish his contention; and even *Rush v. Purcell* (a) does not go that length, because it is obvious that a decree obtained in the Civil-bill Court could not in the Superior Court be brought within the principle of *transit in rem judicatam*.

But it is then contended that this is a second action for the same cause, and in which the plaintiff seeks and may obtain the same remedy as in the former action. In support of that view the defendant relied on the maxim, "*Nemo debet bis vexari pro una et eadem causâ*;" and the language of the law in carrying out the rule *transit in rem judicatam* is but an enforcement of the larger maxim, and an adoption of that rule. Let us consider how far this maxim applies in the present case. The position of the landlord is that he has two remedies:—the first, a personal action for the rent; and, if he does not get satisfaction in that action, secondly, an action of ejectment to recover possession of his land, subject to redemption, by payment of the rent within the statutable period. The two remedies are distinct, and not co-extensive; and the statute, by its 66th section, expressly provides that he shall have both remedies; and there can be no doubt but that the remedies are concurrent. Thus, for instance, to plead another action pending for the rent, would be no answer to an action of ejectment for the same rent; and if the landlord obtains judgment in an action of ejectment for non-payment of rent, he might at once turn round and bring an action of debt for the rent for which he had already had judgment.

But it is said by the defendant that now the action of ejectment has been altered from its former character—that it is now an action for the recovery of the possession of the land, and also to obtain judgment and execution for the rent; and he relied upon the Common Law Procedure Amendment Act (Ireland) 1853, and called

(a) 3 Cr. & Dix, Cir. Cas. 162.

our attention to the language of that Court in one judgment very applicable to this case. He cited sections 195, 202, 207 and 209 of that Act, inclusive. The general object of those sections was to compel the landlord to specify on his writ of summons the full particulars of the rent which he claimed, so as to enable the defendant to pay it if not disputed; or if controverted, in the whole or in part, to apply his defence accordingly, and also to supply a defect which existed in the former procedure, and avoid unnecessary actions, by enabling the plaintiff, where the defendant takes defence, to ascertain in defended actions the amount of rent due, and have execution for it; for formerly a second action was necessary in order to recover the rent; and the second action may still become necessary, if the defendant does not defend the action of ejectment. But, although the action of ejectment is altered in procedure, and in many of its incidents, it still is an action to recover possession of the land, and is not, properly speaking, at all an action for the recovery of the rent, although it may be determined by payment of the rent demanded, and although, in certain events, the plaintiff may, as incident to the recovery of the judgment for the possession of the land, also obtain execution for the rent due.

The defence, as pleaded in the present case, goes to the whole action, though its effect (if any) is merely to show that the plaintiff should not, as to the first half-year's rent, have a second execution for that rent. If the defendant had no other defence, then, by refraining from defending the action, the danger which he apprehends could not arise; and he has brought it upon himself by pleading an untenable defence. But under the pleadings, as they stand at present, though the plaintiff will be entitled to have the whole rent due ascertained by the jury, it does not follow that he is entitled to have a second judgment for the same rent. Nor would the defendant even then be without remedy, because, if the plaintiff abuses his position, by issuing execution for the half-year's rent for which he has already recovered judgment, there is a power in the Court to give a full remedy. At present, the plaintiff is entitled to our judgment on this demurrer.

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Common Pleas.

LAWTHER

v.

THE BELFAST HARBOUR COMMISSIONERS.*

Nov. 22, 24,
 25.
 Dec. 3.

(Common Pleas.)

The 68th section of the Merchant Shipping Act 1862, requires a shipowner, in order to preserve his lien for freight on goods after they have been discharged from a ship, to serve a notice of his claim on the wharfinger at the time when the goods are landed: and the subsequent sections prescribe a course of procedure which the

wharfinger is to adopt, after such notice shall have been given, in order to liberate the goods from the lien and discharge the claim for freight.

A cargo of timber, consigned to A, was discharged at the wharfs of B, and the landing of the goods was completed on the 12th of October. On the 15th of October following, C, who claimed to be owner of the ship, served a notice on B of his claim for freight, and required him to hold the goods until his claim was discharged.

B having retained the goods in pursuance of that notice, an action of detinue was brought against him by A.

On an application by B for an interpleader order under the 9 & 10 Vic., c. 64, on the ground that he could not proceed under the Merchant Shipping Act 1862, as the notice of the 15th of October was not served in time—

Held, per CHRISTIAN, J.—That, as the Merchant Shipping Act 1862 had imposed on the wharfinger the duty of resorting to a prescribed course of procedure in all cases coming within that statute, the question whether any particular case comes within the statute must be decided by the wharfinger on his own responsibility, and is not the proper subject for an interpleader between the consignee of the goods and the shipowners.

Held, per MONAHAN, C. J.—That, unless the case was one so clearly within the statute that the Court would on motion stay the action by A against B, the latter was entitled to an interpleader order; and that, as the Court were not prepared to do so in the present instance, the order should be granted.

* Before MONAHAN, C. J., and CHRISTIAN, J.

of October following. On the 15th of October 1864, the agent for the Marine Investment Company served the following notice on the defendants :—

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 COMMS.

“Belfast, 15th October 1864.

“To the Belfast Harbour Commissioners.

“GENTLEMEN,—I beg to give you notice, in accordance with
 “the Merchant Shipping Act Amendment Act 1862, sections 68,
 “69, 70 & 71, that the trustees of the Marine Investment Company
 “(limited) are the owners of the ship ‘Edward Cardwell,’ now
 “moored at the wharf in the port of Belfast, having discharged
 “cargo of timber into the wharf of which you are the wharfingers,
 “and the said owners claim a lien on said cargo for the freight
 “thereof, amounting to from £1500 to £1700, and you are re-
 “quired to hold said cargo for them until said freight be paid, or a
 “deposit equal thereto be lodged with you, and you are cautioned
 “against otherwise parting with the same.—I am, gentlemen,
 “your most obedient servant,

“THOMAS TRIBE,

“Representative of the Marine Investment Company (limited).”

On the 17th of October, the Marine Investment Company served another notice on the defendants, to the effect that their claim for freight was against the whole cargo. On receipt of these notices, the defendants apprised the plaintiff of the claim of the Marine Investment Company, and on the 19th of October, the plaintiff wrote the following letter to the defendants:—

“Belfast, 19th October 1864.

“William Thompson, Esq., Secretary to the Belfast Harbour
 “Commissioners.

“SIR,—As master of the ship ‘Edward Cardwell,’ I call upon
 “you to deliver the cargo, now in your possession, to the holders of
 “the bills of lading, all freight having been paid; should you
 “detain said cargo, I shall hold you responsible for all loss and
 “damages that may take place in the depreciation in value of
 “the goods, also for any extra commission or charge that I may
 “have to pay, owing to your placing me in a false position.—I am,
 “sir, your obedient servant,

“SAMUEL LAWTHER,

“Master of the ‘Edward Cardwell.’”

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On the 25th of October 1864, the defendants' attorney wrote to the plaintiff as follows:—

“ 108 High-street, Belfast, 25th October 1864.

“DEAR SIR,—We beg to acknowledge the receipt of your letter “ of this date to the Belfast Harbour Commissioners, and, with “ reference to it, to inform you that the Commissioners have “ received notice, under the Merchant Shipping Act Amendment “ Act, that the trustees of the Marine Investment Company “ (limited) are the owners of the ship ‘Edward Cardwell,’ and “ that they, the owners, claim a lien on the cargo for the freight, “ amounting to from £1500 to £1700, and requiring the Com- “ missioners to hold the cargo until the freight was paid, or a deposit “ equal thereto was lodged. Under such circumstances, the Harbour “ Commissioners will, upon the production of a receipt for the “ amount claimed as due, and the delivery to them of a copy of that “ receipt, or of a release of the freight from the owners of the ship, “ or a deposit with them of a sum of money equal in amount to the “ sum claimed, regard the lien claimed as discharged. Mr. Law- “ ther, in his letter of the 19th inst., addressed to the Commissioners’ “ secretary, stated that all the freight was paid, so that there does “ not appear to be any obstacle in the way of his satisfying the “ requirements of the statute.—We are, dear sir, your’s faithfully,

“ M. BUCKLEY & Co.

“ James M’Clean, Esq., Solicitor, 25 Arthur-street.”

No receipt for, or release of the freight was produced by the plaintiff to the defendants, nor was any sum of money deposited by him in respect of the freight.

The defendants had abandoned all claim for storage, and had no interest in the timber—the subject-matter of the action.

It appeared by the affidavit of the plaintiff that, in the month of February 1864, the Hon. Peter Mitchell of Miramichi, in New Brunswick, purchased from Messrs. James Lemon & Son of Belfast, certain sails and cordage to the amount of £3000, and that the said Messrs. Lemon & Co. entered into a contract with the Hon. Peter Mitchell for the purchase from him of a cargo of deals, free on board a new ship, which he was then building, and now called the

"Edward Cardwell;" and a charter-party was entered into between the said parties. By that charter-party the vessel was to be consigned to the plaintiff for all her business. This consignment was made in pursuance of an arrangement entered into between the Hon. Peter Mitchell and the plaintiff, whereby the plaintiff agreed to advance money to the agents of the said Peter Mitchell on account of the freight and cargo of the "Edward Cardwell;" and the plaintiff had accepted bills drawn by the agents of Peter Mitchell in pursuance of that arrangement. The plaintiff was also endorsee of the bill of lading, and the timber was stored in his name in the warehouse of the Belfast Harbour Commissioners; and after the arrival of the ship in Belfast, the plaintiff's name was entered on the register as master of the ship. It appeared, by the affidavit of the agent of the Marine Insurance Company, that a certificate of sale had been executed on the 24th of June 1864, in pursuance of the Merchant Shipping Act 1854, by the said Peter Mitchell, empowering one J. Harris of Liverpool to sell the ship "Edward Cardwell;" and that the said J. Harris, in execution of the said power of sale, sold the said ship to the Marine Investment Company; and by a bill of sale dated the 4th of August 1864, the ship was conveyed to the trustees of the said Company; and a declaration of ownership was duly made by them on the 6th of October 1864, in pursuance of the provisions of the Merchant Shipping Act 1854.

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On the 15th of November, in the present Term, *W. D. Andrews* obtained the usual summoning order under the Interpleader Act (9 & 10 Vic., c. 64).

Harrison and *Norwood* now showed cause.

Maddonogh and *Porter*, for the Marine Investment Company.

Chatterton and *W. D. Andrews*, for the Belfast Harbour Commissioners, in support of the order.

Harrison.

At Common Law the shipowner's lien for freight was gone the moment the cargo was discharged. But the Merchant Shipping

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Act Amendment Act 1862 (25 & 26 Vic., c. 63) provides a mode by which the shipowner may preserve his lien on the goods after they have been landed; but to do so, the shipowner must comply strictly with the requirements of the statute. The 68th section of that Act provides that, "If, *at the time* when any goods are landed from any ship, and placed in the custody of any person as a wharf or warehouse owner, the shipowner gives to the wharf or warehouse owner notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner, to an amount to be mentioned in such notice; the goods so landed shall, in the hands of the wharf or warehouse owner, continue liable to the same lien (if any) for such charges as they were subject to before the landing thereof; and the wharf or warehouse owner receiving such goods shall retain them until the lien is discharged, as hereinafter mentioned, and shall, if he fail so to do, make good to the shipowner any loss thereby occasioned to him." By this section the notice must be given to the warehouse owner contemporaneously with the landing of the goods; for the words of the section are, "if *at the time* when any goods are landed," &c. That was not done in the present instance. The landing of the goods was completed on the 12th of October, and the notice was not given by the Marine Investment Company until the 15th.

Secondly; the Act of 1862 only applies to cases where the dispute is between the shipowner and the consignee. Here it is between two parties claiming as shipowners.

Thirdly; the Marine Investment Company are mortgagees of the ship, and not *shipowners*, within the meaning of the 66th section of the Act of 1862. For these reasons it is submitted that the Merchant Shipping Act Amendment Act 1862 is out of the case, and the defendants' lien is gone.

Macdonogh and A. M. Porter.

The Merchant Shipping Act Amendment Act 1862 provides a complete machinery for liberating goods from the shipowner's lien for freight, without depriving him of the advantages which

that lien gave him; and so far therefore it supersedes the Interpleader Act (9 & 10 Vic., c. 64). The policy of the Act of 1862 was, in the advancement of trade and commerce, to free goods from the shipowner's lien, and allow them to be brought into the market, instead of their being kept impounded in the wharfinger's custody until all disputes were settled between the consignee and the shipowner. Such being the policy of the statute, the Court ought to be astute in carrying out its provisions, and leave the parties to their remedies under it. The machinery provided by the Act is contained in sections 66 to 77. The 68th section enables the shipowner to preserve his lien for freight on the goods after they have been landed, by giving notice of his claim to the wharf-owner. The 70th section enables the consignee to discharge that lien by depositing the amount of the shipowner's claim with the wharfinger. The 73rd section provides that if no deposit is made, or if the lien is not otherwise discharged, the wharfinger may, at the expiration of ninety days from the time the goods were placed in his custody, sell a sufficient part of the goods to satisfy the charges upon them; and the 75th section directs in what priority those charges are to be paid. The 77th section then provides that, "Nothing in this Act contained shall compel any wharf or warehouse owner to take charge of any goods which he would not be liable to take charge of if this Act had not been passed; nor shall he be bound to see to the validity of any lien claimed by any shipowner under this Act." This section gives protection to the wharf-owner for anything done under the Act, and is an answer to the argument that, if the wharfinger proceed under the statute, he may be exposed to actions by both the shipowner and the consignee. If such an action should be brought, he can plead the statute.

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Chatterton and *W. D. Andrews*, for the Belfast Harbour Commissioners.

The Belfast Harbour Commissioners are clearly entitled to the order, unless they are obliged to proceed under the Merchant

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Shipping Act Amendment Act 1862. But it is submitted that they are outside that statute altogether. The Act of 1862 only provides for the case where the dispute is between a shipowner and a consignee of goods, and where the only question is as to the *amount* of the freight. Here the controversy is between two parties claiming as shipowners; and the dispute is, not as to the amount of the freight, but as to which of the parties is entitled to the freight itself. The difficulty arises from the twofold character which Lawther fills—he is not only consignee of the goods, but claims to be owner of the ship, and as such entitled to the freight. The 68th section requires the notice to be served by the shipowner on the wharf-owner *at the time* the goods are landed. In the present instance it was not served until some days after the landing of the goods had been completed. Again, it never could have been in the contemplation of the Legislature to impose on the wharfinger the responsibility of determining questions of such difficulty as arise in the present case; and the determination of them was necessary before they could have acted under the statute at all. For those reasons, it is submitted, this case is outside the Merchant Shipping Act Amendment Act altogether; and the only question is, does it come within the Interpleader Act (9 & 10 Vic., c. 64)? The preamble of that Act states that—“Whereas it often happens that “a person sued at Law for the recovery of money or goods wherein “he has no interest, and which are also claimed of him by some “third party, has no means of relieving himself from such adverse “claims but by a suit in Equity against the plaintiff and such third “party, usually called a bill of interpleader, which is attended with “expense and delay.” This present case plainly comes within the spirit and the words of that preamble; and there is nothing in the position of the Belfast Harbour Commissioners to deprive them of the relief given by that statute. They have abandoned all claim for storage, for the purpose of removing any difficulty which might arise from the circumstance of their being interested in the subject-matter in dispute.

They cited *Harwood v. Betham* (a); *Cotter v. The Bank of England* (b); *Best v. Hayes* (c); *Scott v. The Midland Great Western Railway Co.* (d); *Crawshaw v. Thornton* (e).

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Norwood, in reply.

Cur. adv. vult.

On this day the Court delivered judgment.

Dec. 3.

CHRISTIAN, J.

The questions which have arisen in this case, and the facts which have presented them, are so fresh in the recollection of the parties and their Counsel, that I do not think it necessary to recapitulate them.

Of the many subjects which were discussed during the argument I shall confine myself to one, namely, the effect of the 68th and following sections of the Merchant Shipping Act 1862 upon the claim of the Belfast Harbour Commissioners (the defendants in this action) to the benefit of the Interpleader Act (9 & 10 Vic., c. 64). As to all the other matters argued, I shall say no more than this, that I am of opinion, and so I believe I may venture to say is the LORD CHIEF JUSTICE, that the conflicting claims of the plaintiff Mr. Lawther, and of the claimants the Marine Investment Company, upon the goods now in the defendant's possession, are in their nature a proper subject for interpleader; that there is nothing in the circumstances under which the defendants got possession of the goods, to take away from them the right to the benefit of that protection; and that, consequently, if the Merchant Shipping Act had not been passed, an interpleader order would have pretty nearly been as of course. But the Merchant Shipping Act having been passed, the question now is, what is its effect upon the right which, but for it, the defendants would have had.

It was not, I think, disputed during the argument, and at all events is, I think, clear enough upon the statute, that, in cases

(a) 1 Law Jour., N. S., Exch. 180.

(b) 3 M. & Sc. 180.

(c) 32 Law Jour., N. S., Exch. 129.

(d) 2 Ir. Com. Law Rep. 83.

(e) 3 M. & C. 1.

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to which the Merchant Shipping Act applies, it is exclusive, and that the wharfinger is bound to pursue the method there prescribed for discharging the lien. For facilitating commerce, by the prompt liberation of the subjects of its transactions, a new and summary method is laid down, by which the liens which the statute itself, in the first instance, prolongs, are promptly discharged, though the property in the freight may remain undecided. Therefore, in a case to which the Merchant Shipping Act applies, an interpleader order ought not to be made.

The Marine Investment Company have assumed to proceed under the Merchant Shipping Act, and have required the defendants to proceed under it. If they were entitled to make that requisition, and if it was made in due time and form, it is clear that an order under the Interpleader Act should not now be made. Thus, the first question which meets us, and which we must deal with before we can advance a step, is, whether the Marine Investment Company have brought this case within the Merchant Shipping Act.

The Counsel for the plaintiff have insisted, and upon various grounds, that the statute does not apply. They say that it appears, from the facts disclosed in the affidavits, first, that the Marine Investment Company did not answer the description of "ship-owners" having right to give the notice required by the 68th section; secondly, that the case is not simply one of lien between shipowner and goods-owner, to which only, they say, the Act can be applied, but is one in which the title to the freight itself is in dispute between parties some of whom are absent; thirdly, that the notice was not given at the time required by the 68th section.

On the other hand, the Counsel for the claimants the Marine Investment Company have insisted that the case is governed in all respects by the statute.

The Counsel for the defendants have so far followed up the same line of argument as the plaintiff's Counsel, as that they have contended that at all events the points raised are of so much doubt and gravity that the wharfingers ought not to be required to take the risk of deciding them; but that, of themselves, irrespectively of the

original conflict as to freight and lien, those questions constitute proper ground for interpleader. M. T. 1864.
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There is not, I believe, any difference of opinion that, *if it were perfectly clear* that any of the objections which the plaintiff has urged against the proceeding of the Marine Investment Company was well founded, the Merchant Shipping Act would be put out of the case, and the parties must interplead. On the other hand it is, I believe, equally undoubted that, *if it were perfectly clear* that all those objections are unfounded, then the case would be governed by the Merchant Shipping Act, and no order could be made under the Interpleader Act.

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As to the first two of those objections, we are, I believe, agreed that it is reasonably clear that they ought not to prevail. We think it is sufficiently shown that the Marine Investment Company were persons entitled to give a notice under the 68th section; and we also think that the existence of a controversy as to the ultimate right to the freight can have no bearing on the question of the application of a statute which is conversant with nothing but the continuing and discharging of liens.

Thus the case is narrowed to the consideration of the third of the plaintiff's objections. The notice by the Marine Investment Company to the defendants was not delivered until three days after the whole of the cargo had been landed on their wharf, and entered in their books to the credit of the plaintiff as consignee. For this reason the plaintiff insists that the notice is a nullity, and the case never brought within the terms of the Merchant Shipping Act at all.

It cannot, I think, be denied that this is a question both of difficulty and importance. It is, in my opinion, one of considerable difficulty and doubt upon the construction of the statute, especially when regard is had to the previously existing law. Then that raises at once the question, which is the one on which the CHIEF JUSTICE and I have not been able altogether to agree:—how and when is that question to be decided? Are the wharfingers bound to determine it at their peril, and the goods-owner, asserting that the notice is null, and refusing to make any deposit under the 70th

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section, and bringing his action of trover, must they go on and take the risk of selling under the 73rd section? Or is this question in itself a proper subject for interpleader, and therefore, so far from being an obstacle, forming an additional reason for granting the order which the defendants seek?

I am obliged to say that, while fully appreciating the force of the defendants' contention, and the difficulty of their position, I have been unable to persuade myself that this question is one which can with propriety be made the subject of an order under the Interpleader Statute. It seems to me in its nature a *previous question*, and that, while it is undecided, you cannot approach the Interpleader Act at all. That Act is, as I have said, superseded by the Merchant Shipping Act, in cases to which the latter applies. So long therefore as there is, in any given case, a question unsolved, as to whether the Merchant Shipping Act applies, so long it seems to me that the Interpleader Act must be silent. In order to try the question whether there ought to be any interpleader, you cannot surely begin by granting an interpleader. It would be strange to grant an interpleader to try a question which, if answered in one way, would show that the case was not one for interpleader. If the plaintiff and the Marine Investment Company were now ordered to interplead, and the result of their interpleading were to show that the Marine Investment Company had by their notice preserved their lien—in other words, that the case was within the Merchant Shipping Act—why, then it would become apparent that it was not within the Interpleader Act, and the order to interplead ought not to have been made. In short, it seems to me that such an order, in the present case, would inevitably involve a decision that the notice was bad; and, not merely that it was bad, but that it was very clearly bad.

A slight reference to the well-known principles of interpleader will make my meaning clearer. Nothing in that doctrine is, I conceive, better settled than this, that no questions are proper subjects for its operation save those whose incidence is entirely between the two conflicting claimants against whom protection

is sought. If the party who asks the order is implicated himself in the subject, as, if he claims an interest—if he has incurred some special liability to one of the disputants—if he has taken an indemnity from the claimants, or the like,—in all such cases he must act at his own peril, and defend himself in ordinary course of law, but will obtain no protection in the way of interpleader, either at law or in equity; and though these things may themselves be matter of doubt, the Court will not decide them, or put them in train for decision, in the interpleader proceeding, but will recognise their mere existence, even as matter of question, as ousting the application of that remedy altogether. To cases of this class ought, in my opinion, be added one like the present, in which the Legislature has thought proper, not merely in the interests of private individuals, but, as it seems to me in some respects, in furtherance of a public policy, to impose on a class of persons in a certain class of cases an obligation or duty to pursue a certain line of conduct, as this statute has done, by enjoining wharfingers to resort to a prescribed method of procedure for the prompt liberation from restraint of the subjects of commercial dealings. If in any particular case it becomes a question whether this obligation or duty has come in force, I think the party charged with it must act on his own responsibility, and cannot ask a Court to send it to be decided for him between other parties.

I am therefore of opinion that this previous question, whether the Merchant Shipping Act applies to the case—which on the facts resolves itself into the question whether the notice of the Marine Investment Company was served in time,—is not one proper to be litigated by way of interpleader between Mr. Lawther and the Marine Investment Company, but should be left to be decided, as against the wharfingers themselves, in the action now pending against them.

It is worthy of observation that, although in argument the defendants' Counsel have, to the extent I have mentioned, rather sided with the plaintiff's Counsel, that is not at all the way the case is put in the affidavit on which the defendants obtained their summoning order. On the contrary, their contention there

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that the case is within the Merchant Shipping Act; and what they ask the Court to do is, to relieve them from the responsibility which that Act has thrown on them. From that untenable position their Counsel wisely withdrew, and put the case in argument in the way I have stated.

Of the ultimate question itself, whether the notice of the 15th of October was sufficient to bring the case under the Merchant Shipping Act, I desire at present to say as little as I can help. The Court being equally divided upon the present occasion, I presume the effect will be, that no rule will be made upon the defendants' application. The result of that will be, that the plaintiff will be at liberty to proceed with his action, and (unless the parties are wise enough to settle the matter amicably) the defendants will plead the notice, and the statutable obligation thereby said to be cast upon them. The plaintiff will probably reply the facts which he says invalidate that notice, and ultimately, whether upon demurrer or after trial, but at all events subject to an appeal, the question will be brought before this Court. I wish to reserve my opinion upon it until then; and therefore all I shall now do is, all that for my present purpose it is necessary to do, viz., show that it is a substantial question whether that notice is not a valid one. So much I am bound to do, because if it were clearly invalid, there would be nothing to prevent an order to interplead.

The plaintiff's contention is founded on a very literal construction of the 68th section of the statute. He says that the words, "At the time when any goods are landed from any ship, "and placed in the custody of any person, as a wharf or warehouse "owner," necessarily import that the notice must be contemporaneous. Contemporaneous with what, was not very clearly defined during the argument, whether, with the placing on the wharf of each item of the cargo, so that there should be a separate notice for every piece of timber, or with the placing on the wharf of the last piece of timber, or with the doing by the wharf-owner of some overt act of acceptance on account of the goods-owner, such as entering

them to his credit in his books. On the other hand, the contention of the claimants was, that those words are not so restrictive but that they admit of the notice being given, so long as the goods remain on the wharf or in the store; or at all events so long as rights of third persons do not intervene; or at all events within a time which, under the circumstances of the case, would be considered to be reasonable.

It is obvious that the question is one of as great importance as any that could well arise regarding the operation of this enactment; for, according as it shall be decided, so will the area of operation of the statute be largely diminished or increased. It constantly happens that there are persons having claims on the ship or on the freight, who reside at a distance from the port of discharge (as in the present case, for example, the Marine Investment Company, and the Messrs. Baring of London), who may be ignorant of the time of arrival of the ship, and unable to take measures for a notice contemporaneous; all such persons would, on the plaintiff's construction, be practically excluded from the benefit of the statute.

Such was not the law under the Bonded Warehouse Act (8 & 9 Vic., c. 91, s. 51). Under that enactment there was no limit as to the time within which the notice should be given; and it would seem that it might have been given at any time while the goods remained in the bonded store. That enactment was confined to bonded warehouses, and did not extend to ordinary wharfingers. It is repealed by the Merchant Shipping Act 1862, and in lieu of it are given the provisions contained in section 68, and the following sections of the latter statute. They comprise as well bonded warehouse-keepers as ordinary wharfingers. There is nothing to indicate an intention to alter the law in the important particular I am referring to, save what is to be collected from the use of those words in the 68th section—"at the time when," &c. And I think it may be argued, and with not inconsiderable force, that those words do not necessarily work so serious an alteration—do not necessarily show that the Legislature, in the same breath in which it was largely increasing the classes of

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persons who were to be brought under the law, meant to make a change which would practically exclude a great proportion of *the cases* to which it was previously applicable. It may fairly be argued that these words are capable of being so construed as to avoid that consequence; that "at the time when any goods are landed" is really synonymous with "when any goods are landed;" and that "when goods are landed" might, without violence, be held to mean "as soon as they are landed," or "after they have been landed." I cannot, upon this motion, take upon myself to say that these and other arguments which might be and which have been pressed, are not entitled to considerable weight. No doubt there are very weighty arguments upon the other side; and if I do not further advert to them now, it is not because I do not feel their weight, but because all that is necessary for my present purpose is to show that, although the notice of the Marine Investment Company, served three days after the landing of the cargo was completed, is *prima facie* not within the literal terms of the statute, yet there are at least substantial grounds for insisting that it is within its true construction. Having got that length, I see that there is a question of difficulty and of importance in its nature—a previous question, and one personal to the wharfinger, which must be solved before it can be predicated of the case that it is within the provisions of the ordinary Interpleader Act; and, for the reasons I have already stated, the existence of such a question is, in my opinion, a complete answer to the defendants' application.

MONAHAN, C. J.

I regret that I cannot concur with my Brother CHRISTIAN in the conclusion at which he has arrived. It occurs to me that the Belfast Harbour Commissioners are entitled to the order they seek—namely, that the plaintiff, Mr. Lawther, and the Marine Investment Company should be obliged to interplead, so as to have it decided *inter se* whether Mr. Lawther is entitled to the goods in question, discharged of any claim for freight of the Marine Investment Company; or whether, on the other hand, the latter

are entitled to a lien on the goods, and if so, what the amount thereof is. It cannot be questioned, but that previous to the Merchant Shipping Act of 1862 this would be a fit case for an interpleader order. It is a case in which the defendants are sued by Mr. Lawther for the detention of goods of the value of some £4000 or £5000, which he delivered to them as wharfingers, and which he insists they are bound to deliver to him. The Marine Investment Company, on the other hand, insist that they have a lien for freight to a considerable amount on the goods; and that having given notice of their claim to the defendants, the Belfast Harbour Commissioners, they are bound to retain the goods for their benefit, and that unless they do so, they shall be held responsible for the amount; precisely the ordinary case for an interpleader order, and in which, unless the Court interpose, it may be that in the present suit Mr. Lawther may be held entitled to recover the value of the goods; and in a subsequent action, the Marine Investment Company, not being bound by the proceedings in this action, may be held entitled to recover against the Belfast Harbour Commissioners the amount of their alleged lien. But then it is said, that the effect of the Merchant Shipping Act 1862 is to deprive the wharfinger of his right to an interpleader order. I can quite understand that if the present case was so clearly within the provisions of that Act, and that the Court was prepared on motion to stay the proceedings in the present action, and decide that the plaintiff Mr. Lawther could not maintain any action, but should proceed, if at all, in the manner pointed out by the Merchant Shipping Act, that in such case there would be some grounds for saying that the Court should not make an interpleader order; but, as I understand, neither my Brother CHRISTIAN nor myself are prepared to make any such order. The first objection to our making any such order is this—the plaintiff Mr. Lawther insists the case does not at all come within the provisions of the Act, because the notice of the claim for lien was not served till after the delivery of the goods was completed; this depends on the 68th section of the Act, which provides that, if at the time when goods are landed and placed in the custody of a wharfinger, the shipowner gives to the wharfinger notice of his lien

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and the amount thereof, &c. &c. The 77th section may be considered to have a bearing on the question, by which it is enacted, that nothing in the Act contained shall compel any wharf-owner to receive any goods which he was not previously bound to receive; "nor shall he be bound to see to the validity of any lien claimed by any shipowner under this Act." Now what may ultimately be decided as to the notice being in time to preserve the lien, if any existed, I do not think it necessary just now to conjecture; I may however remark that, under the Bonded Warehouse Act, the shipowner was at liberty to give notice of his lien at any time while the goods were in bond; the result of which was, that whoever purchased goods in bond was obliged to satisfy himself of the non-existence of any claim for lien. This Act is repealed by the Merchant Shipping Act. I believe before the latter Act, if the goods were delivered to an ordinary wharf-owner, without notice of any claim for lien, that the lien was lost, as in the case of a delivery to the owner of the goods, which of course destroyed the lien. I shall not pursue the inquiry further, but merely say, as at present advised, if I were now called on to decide the question, I am not prepared to say that the notice was in time, and therefore that the case at all comes within the Merchant Shipping Act. But even if it should be held that the notice was within time, Mr. Lawther further insists that the case does not come within the provisions of the Act, as the Marine Investment Company, if they have any interest in the ship in question, were only mortgagees, and as such are not shipowners entitled to freight, and therefore not entitled to avail themselves of the Act in question. I must say I am not prepared to express any satisfactory opinion on this part of the case; I have not the facts fully before me to enable me to form any opinion as to what exactly is the position of the Marine Investment Company; but of this I feel clear, that this question should be decided in a suit in which the principal parties, namely, Mr. Lawther and the Marine Investment Company, should be parties and bound by the proceedings; and that the Belfast Harbour Commissioners are not the parties to litigate this matter, in which, in fact, they

have no interest, and in a suit which may not be effectual to protect them from the other party.

No doubt, in a simple case between an admitted shipowner and the owner of the cargo, when the amount of the freight is the only matter in dispute, and that the parties chose to avail themselves of the provisions of the Merchant Shipping Act, it seems well adapted for the ascertainment of their rights; and possibly in a case clearly within the terms of the Act, the wharfinger, without entering into the actual merits of the dispute between the shipowner and the owner of the cargo, may be able to force them to have this dispute arranged under the provisions of that Act; but on this question I refrain from expressing any decided opinion, as, however that may be, I do not think this is such a case; and, for the reasons I have already stated, I do not think we have the power to stay the proceedings in this suit, and thus oblige Mr. Lawther to proceed under the provisions of the Merchant Shipping Act. In considering what order, under these circumstances, we should make, it is of course our duty to consider what the effect of our order will be. If then we refuse the present application, the result will be, that the Belfast Harbour Commissioners must defend themselves as best they can in the present action, either by showing that the case comes within the provisions of the Act, and further, that being within the Act, Mr. Lawther is not entitled to maintain the present action; or, irrespective of that question, that in fact Mr. Lawther is not entitled to the goods, in consequence of the Marine Investment Company having a valid subsisting lien on the property—a very unsatisfactory prospect in a suit not binding on that Company, who at the same time may commence an action against the Belfast Harbour Commissioners for not selling the cargo in pursuance of the provisions of the Merchant Shipping Act. This is the precise mischief the Interpleader Act was intended to remedy.

If, on the other hand, as I am of opinion we ought to do, the Court makes an order that the parties interplead, we may direct that the Marine Investment Company should bring an action against Mr. Lawther for the conversion of the goods in question; that he be obliged to admit the conversion, and the

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question to be tried to be, whether while the cargo was on board the ship, the said Company had a lien on it, to any and to what amount; and if so, whether said lien continued and was still subsisting while the cargo was in the possession of the Belfast Harbour Commissioners? It occurs to me that in that action the rights of the parties could be finally and satisfactorily determined; but if I have overlooked any other directions that ought to be given, of course the omission could be supplied. If we make an order such as I propose, the proceedings will be substantially the same as if the parties had chosen to proceed under the Merchant Shipping Act; the real questions in the case will be decided so as to bind the parties really interested; and I confess I cannot see that in any view of the case we, by making such an order, would inflict injury on any party. As, however, the Court is equally divided, the result will be that we can make no rule one way or the other; the effect of which will be that each party must abide their costs of the motion, and the Belfast Harbour Commissioners must either defend the action as best they can, or devise some other means of getting out of the difficulty in which they are placed.

No rule.

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Exchequer.

WILLINK v. ANDREWS.*

(*Exchequer.*)

Jan. 27, 30.

A writ of *fi. fa.*, at the suit of Hugh Andrews and the Londonderry and Lough-Swilly Railway Company, marked for the sum of £230, was lodged with the Sheriff of the county of Londonderry, in the month of October 1864. The Sheriff seized certain locomotive engines, passenger carriages, and waggons belonging to the Railway Company. Shortly after the seizure, the Sheriff received a letter from Williamson Willink, the Secretary to the Public Works Loan Commissioners, informing him that the works, lands, and undertakings of the Londonderry and Lough-Swilly Railway Company were, by duly registered deeds, dated the 15th of December 1862, and the 20th of October 1863, mortgaged to the Public Works Loan Commissioners, to secure advances to the amount of £13,000. The Sheriff obtained an interpleader order; and on the 9th of November following, it was ordered that an issue should be tried, in which W. Willink, as Secretary of the Public Works Loan Commissioners, on behalf of her Majesty the Queen, a claimant, should be plaintiff, and the execution creditor, H. Andrews, should be the defendant. The defendant abandoned all claim to the goods and chattels of the Company, save those mentioned in the issue, which was as follows:—"Whether the two locomotive steam engines "by Stephenson, Newcastle, and the two third-class carriages by "Frith of Belfast, being part of the goods and chattels seized by "the Sheriff, were, at the time of the seizure, the property of the

By a mortgage deed, dated the 17th of October 1863, a Railway Co. conveyed to the Secretary of the Public Works Loan Commissioners the line, "and also all the works, messuages, and tenements, lands and hereditaments, property and estate, chattels and effects, of or belonging to the said Company, or which they are in any wise seized, possessed of or entitled to, or of or to which the said Company may at any time hereafter during the continuance of the security intended to be hereby made, be seized, possessed, or entitled. The 5 Vic., sess. 2, c. 9, s. 15, under which the loan to the Company was

made, enacts that all mortgages taken by the Secretary of the Loan Commissioners shall be valid in law to pass all the estate or interest of such mortgagors, and for all other objects intended to be effected by such conveyances, except where otherwise expressly provided by such mortgages.—*Held*, that the mortgage to the Loan Commissioners did not include or affect property acquired by the Company subsequent to its execution.

* *Coram* FROST, C. B., HUGHES and DEASY, BB.
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 ANDREWS. not. Those engines and carriages had been purchased in August 1864, subsequent to the date of the mortgage to the Loan Commissioners.

The issue was tried on the 28th of March 1864, before the LORD CHIEF BARON, at the Sittings after Michaelmas Term 1864.

The defendant proved that the goods in question were in the possession of the Railway Company at the time of the seizure on the 7th of October 1864.

It was admitted by the plaintiff that the goods in the issue mentioned had been purchased by the Railway Company subsequent to the date of both the mortgages to the Loan Commissioners, and before the defendant had issued his writ of *fi. fa.*

It was also admitted that no act had been done on behalf of her Majesty, or by the Loan Commissioners, or by the Railway Commissioners, towards reducing the goods in question into the possession of the Loan Commissioners subsequently to their acquisition by the Company.

Counsel for the plaintiff called upon his Lordship to direct a verdict for the plaintiff, on the grounds that, by the conjoint operation of the two mortgages of the 15th of December 1862 and the 20th of October 1864, and the Acts therein recited, the property in the issue mentioned, although acquired subsequent to the execution of the mortgages, was absolutely vested in the plaintiff. His Lordship refused the application, and directed the jury to find for the defendant, reserving leave to the plaintiff to move to have the verdict changed to one for the plaintiff—either party to be at liberty to appeal.

A conditional order to enter a verdict for the plaintiff having been obtained—

F. Meade (with whom was *F. Macdonogh*), for the defendant, now showed cause.

The following Acts of Parliament empowering the Public Works Loan Commissioners to advance sums of moneys for the execution and completion of public works were cited :—57 G. 3, c. 34 ;

57 G. 3, c. 124; 1 & 2 G. 4, c. 111; 3 G. 4, c. 86; 5 Vic., H. T. 1865.
 c. 9, ss. 11 and 15; The Lough-Swilly Railway Company Act ^{Exchequer.}
 1853 (16 & 17 Vic., c. 54, Loc. and Per.); the Lough-Swilly ^{WILLINK}
 Railway (Deviation) Act 1859 (22 & 23 Vic., c. 1, Loc. and Per.). ^{v.} ^{ANDREWS.}

The mortgages made to the Public Works Loan Commissioners through their Secretary, the plaintiff in this action, were made under the 15th section of the 5 Vic., c. 9—[set out in the LORD CHIEF BARON's judgment]. That Act alters the form of mortgage, not the extent of the security. The mortgage deed conveyed to the Commissioners all the works, messuages, hereditaments, property, chattels and effects, of which the Company was seised, possessed or entitled to, or to which the said Company might at any other time thereafter during the continuance of the security be seised, possessed of or entitled to. But those words did not pass to the Commissioners any property purchased by the Company subsequently to the 20th of October 1863. In the words of Lord Justice Turner, in *The London, Brighton, and South Coast Railway Co. v. The London and South Western Railway Co. (a)*:—"Where the words of an Act of Parliament "extend to what is lawful, and to what is unlawful, I apprehend "that, in the absence of express provision or necessary construction, "they can be applied only to what is lawful." The 16 & 17 Vic., c. 40, s. 2, and the 24 & 25 Vic., c. 80, s. 9, relating to loans for public works, were also cited.

J. Whiteside, S. Ferguson, and W. Boyd, contra, cited Holroyd v. Marshall (b) and Lunn v. Thornton (c).

F. Macdonogh, in reply.

PIGOT, C. B., delivered the judgment of the Court.

The plaintiff in the interpleader issue is the Secretary of the Public Works Loan Commissioners. The defendant is an execution creditor of the Londonderry and Lough-Swilly Railway

(a) 4 De Gex & Jones, 396.

(b) 10 H. of L. Cas. 191.

(c) 1 C. B. 379.

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ANDREWS. Company. Two locomotive carriages, while in possession of the Company, were seized by the Sheriff under the defendant's execution (a writ of *feri facias*), issued upon a judgment obtained at the defendant's suit against the Company. The plaintiff alleges that the goods became the property of the Public Works Loan Commissioners, under two mortgages, dated respectively the 15th of December 1862 and 17th of October 1863, executed by the Company to the plaintiff, the Secretary of the Commissioners, to secure loans of money advanced by them to the Company under the several Acts which regulate their proceedings as to loans, and which make provision in reference to securities given for such loans. It is only necessary to refer, with a view to our judgment, to the second of those mortgages, since the same question would arise under each instrument. By that mortgage, in consideration of a large sum of money lent by the Commissioners to the Company, and admitted to be still due, the Company assigned and assured certain property to the plaintiff, the Secretary of the Commissioners, to secure that loan. It is unnecessary to refer to any of the property comprised in the deed, save that which the deed professes to transfer by the words, "And also all the works, messuages and tenements, lands "and hereditaments, property, estate, chattels and effects, of or "belonging to the said Company, or which they are in any wise "seized, possessed of or entitled to, or of or to which the said Company may, at any time hereafter during the continuance of the "security intended to be hereby made, be seized, possessed or entitled."

It was admitted at the trial that the goods in question were, at the time of the seizure, in the possession of the Company; that the execution was lodged with the Sheriff before the seizure; that the goods in question had been purchased by the Company in August 1864, after the execution of the last of the two mortgages, and before the issuing of the writ of execution under which the goods were seized. It was further admitted, that there was no new act done, in reference to the goods, by or on the part of the Londonderry and Lough-Swilly Company, or by or on the part of the Commissioners, or by or on the part of her Majesty, subsequently to the execution or

registration of either of the mortgages, or subsequently to the acquisition of the goods by the Company. A verdict having been given, pursuant to a direction at the trial, the question now is, whether, upon the reservation made by way of point saved at the trial, that verdict shall be turned into a verdict for the plaintiff? and that depends upon the question, whether, under the mortgage, the goods were, at the time of seizure, the property of the Commissioners, or not. For the purpose of deciding this question it may be assumed, that if the plaintiff acquired a property in the goods under the mortgage executed to him as Secretary, then the goods, in result, under some of the provisions of the Acts of Parliament regulating these proceedings (it is immaterial under which of those provisions—the Acts of Parliament being numerous, and several of the provisions appearing to be cumulative) became the property of the Public Works Loan Commissioners.

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No doubt can exist that, at Common Law, the goods in question, not having been acquired by the grantors when the mortgage deed was executed, did not pass by the deed. After the case of *Holroyd v. Marshall* (a), it would be idle to cite authorities on that subject.

The only question is, whether, by force of any of the Acts of Parliament affecting the dealings, with borrowers, of the Commissioners, the mortgage, ineffectual to pass subsequently acquired property at Common Law, and not followed by any act of the Commissioners reducing the goods into their possession, conferred upon the Commissioners a valid title to those goods, at law?

Several of the numerous legislative provisions, affecting the Commissioners, and loans made by them and securities granted to them, were referred to in the argument. It appears to me to be perfectly useless to advert to any of them save one. All the others are, in my judgment, wholly beside the question which is to be determined by us, and which depends, in result, upon the 15th section of the 5 *Vic.*, sess. 2, c. 9. The other provisions of various Acts of Parliament only show, that the Legislature have from time to time enlarged the powers of the Commissioners to lend, and enlarged the

(a) 10 H. of L. Cas. 191.

H. T. 1865. powers of public bodies to grant securities for loans made to them ;
Exchequer. and, further, that the Legislature have made various regulations
 WILLINK relating to loans, and to the property pledged to secure such loans ;
 v. but those provisions do not, as it appears to me, furnish any key to
 ANDREWS. the construction of the section by which the present question must
 be determined. That section is as follows.*

On that section the question lies within a very narrow compass. The section enacts, that all mortgages (and other assurances which it describes), to be taken by or on the part of the Commissioners, shall be prepared in such form as the Commissioners shall from time to time order or direct, and, when executed by the mortgagors or other parties making such assurances, "shall be valid and effectual "in law to pass all the estate or interest of such mortgagors, or

* " And be it enacted, that all mortgages, conveyances, assignments, charges, securities, or other assurances which shall from time to time be taken by or on the part of the said Commissioners of the said recited Acts, and of this Act, or by their Secretary, shall be made and prepared in such form as the said Commissioners shall, from time to time, order or direct; and when executed by the mortgagors, or other parties making such mortgages, conveyances, assignments, charges, securities, or other assurances, shall be valid and effectual, in the law, to pass all the estate or interest of such mortgagors or other persons in the property, estate, or effects comprised therein (except when otherwise expressly provided by such mortgages, conveyances, assignments, charges, securities, or other assurances, and for all other the objects and purposes expressed or intended to be affected* by such mortgages, conveyances, assignments, charges, securities, or other assurances), but subject nevertheless to such right of redemption, if any, as shall or may, by such mortgages, conveyances, assignments, charges, securities, or other assurances, be reserved to the mortgagors or other persons executing the same as aforesaid; and to such other right or equity of redemption, if any, as shall or may arise thereout under any rule of equity; and the fact of the Secretary of the said Commissioners being a party to such mortgages, conveyances, assignments, charges, securities, or other assurances, shall be deemed conclusive evidence of the same mortgages, conveyances, assignments, charges, securities, or other assurances, having been so made and prepared in the form prescribed by and under the order and direction of the said Commissioners; and that all mortgages, conveyances, assignments, charges, securities, or other assurances, already executed unto the said Commissioners, to their Secretary, shall be deemed and taken to have been prepared, in like manner, under the order or direction of the said Commissioners, and shall also be deemed and taken to have had the whole operation in passing all the estate or interest of the mortgagors, or other persons executing the same on the property, estate, or effects comprised therein, or for all other the objects and purposes aforesaid, or intended to be effected thereby, except and subject as aforesaid."

* *Sic.*

other persons, in the property, estate, or effects comprised therein." So far, the section deals only with the property which was the property "of the mortgagor," &c., at the time of the making of the assurance. Then comes the following passage, within a parenthesis: "(Except when otherwise or expressly provided by such mortgages, conveyances, assignments, charges, securities, or other assurances)." There, as it appears to me, in conformity with the plain import of the words, the parenthesis ought to end. But the clause proceeds thus: "and for all other the objects and purposes expressed or intended to be affected" [it must be read effected] "by such mortgages, conveyances, assignments, charges, or other assurances.)" There, in the printed copy of the statute, the parenthesis ends; and the clause then proceeds: "but subject nevertheless to such right of redemption, if any, as shall or may, by such mortgages, conveyances, assignments, charges, securities, or other assurances, be reserved to the mortgagors or other persons executing the same as aforesaid, or to such other right or equity of redemption, if any, as shall or may arise thereout, under any rule of equity." It is contended, on the part of the plaintiff, that under the foregoing words, and especially under the words "and for all other the objects and purposes expressed or intended to be affected" [or effected] "by such mortgages," &c., the Commissioners, or their Secretary for them, took a property in the subsequently acquired goods; because the mortgage of the 20th of October 1863 expressed a clear intention that such subsequently acquired property should pass to them. And undoubtedly those words of the section, in one view of them, may be stretched to convey that meaning. But if they be so construed, they can only be so construed by giving them an import so extensive—indeed I should say so vast—that no tribunal would be justified in attaching such a meaning to such a provision, if an interpretation more reasonable can be applied. What the plaintiff insists on, in effect, is this, that by the words "and for all other objects and purposes expressed or intended to be affected by such mortgages," &c., property may pass, by force of the statute, which a grantor had not when the deed was executed, and which, but for those words, he had no right or power to pass

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by the deed. It is clear that the grantors, in the present case, when the deed was executed, not only had not the goods in question, but had no right or power in law to pass them, as subsequently acquired goods, 'by the deed. And if the deed, by force of those words of the 15th section of the statute, can have the operation of passing those goods to the Commissioners or their Secretary, that must be by giving to the section the force of passing any property, whether real or personal, and whether the Company was entitled to it or not, which it was an "expressed or intended" object "or purpose" of the deed to pass to the grantee. On the construction contended for by the plaintiff, those words must mean this: that, *whatever* be expressed, or intended, by the deed, it shall have, at law, the operation so expressed or intended; so that if the Company, or any other borrower, expressed the intention to convey, and in terms purported to convey, property in litigation between the grantors and others; property as to which there was a disputed title not yet litigated; or property to which they neither had, nor otherwise claimed to have, nor ever before claimed to have, any title, or colour of title, prior to the preparation of the deed, *that* property would pass to the Commissioners, or to their Secretaries, since to pass it was one of the "objects and purposes expressed or intended to be effected" by the deed. In truth, absurd and preposterous as such a notion may be, if this construction be the right construction of the Act of Parliament, and if the parties were wild enough to do it, the grantors might make over to the Public Works Loan Commissioners the fee-simple of all England. I test the construction by putting this extreme and incredible case; because it is perfectly plain that no limits exist to confine the power of the grantors of securities to the Commissioners for loans, in giving valid assurances upon the most infirm titles, or upon no titles at all, if the construction of the 15th section of the Act, for which the plaintiff contends, can be maintained. To avoid attributing to the Legislature an intention to confer such a power of invading the property of others, we must consider whether a more reasonable import, one consistent with the words used and purpose indicated by the whole context, can be given to the section. And in my opinion

the meaning of the section is, plainly, this—that the deed, in the form prescribed by the Commissioners, shall be effectual to “pass all the estate or interest of such mortgagors or other persons in the property, estate or effects comprised therein;” and shall also be effectual “for all *other* the objects and purposes expressed or intended to be effected by such mortgages,” &c.—Other than what? other than the passing “of the estate or interest of such mortgagors or other persons in the property, estate or effects comprised therein.” By the first part of the clause, provision is made for all that relates to the passing the estate or interest in the property comprised in the deed. By the second part of the clause, provision is made for all the various ancillary provisions of the deed; the covenants, conditions, provisoes, and various clauses showing the contract between the parties; and, possibly, all provisions for collateral securities. The real objects of the section appear to have been to provide that, whatever former regulations may have been prescribed in reference to the form of the security, any form which the Commissioners “shall from time to time order or direct,” shall be valid and effectual for the purpose of securing the loan which is intended to be secured by it; that the fact that the deed has been executed to the Secretary of the Commissioners shall be conclusive proof that the deed is in due form; and that those provisions shall apply to all former, as well as to all future, instruments given to the Commissioners to secure advances. The result of those provisions appears to be, that no defect of form shall invalidate any of these assurances, and that no proof shall ever be required that, under the various Acts of Parliament in force when formal deeds were executed, the Commissioners for the time being had directed the form in which the instruments were prepared, if the deed be executed to the Secretary of the Commissioners.

If this be the true construction of the 15th section, then the Commissioners or their Secretary, acquired, at law, no property by this deed. If they had taken possession of the subsequently acquired goods of the Company, in pursuance of a provision for that purpose (if it were contained in the deed), they would have been entitled to retain it. The cases are collected in *Holroyd v.*

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H. T. 1865. *Marshall* (a); the last preceding decision being that of *Hope v. Exchequer*.
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 ANDREWS. *Hayley* (b); all adopting the distinction laid down by Lord C. J. Tindal, in *Lunn v. Thornton* (c), between chattels existing at the time of the deed, and chattels subsequently acquired. But the deed was as inoperative to pass chattels which were not then the property of the grantors, as it was to pass any other property which then belonged to another: and the 15th section only declares its validity to pass the estate or interest of the mortgagor in the property comprised in it. There was no estate or interest of the mortgagor, in the goods in question in this interpleader issue, when the deed was executed.

The latter part of the 15th section has been referred to as sustaining the view of the plaintiff's Counsel in reference to the former part of it. The latter part has also been relied on by the defendant's Counsel. It consists of three portions. By the first, the fact of the Secretary being a party to the deed is made conclusive evidence that it was framed in the form directed by the Commissioners. By the second portion, it is enacted, that all former instruments "executed to Commissioners, to their Secretary," (so in the printed copy of the Act) shall be deemed to have been in like manner prepared under the direction of the Commissioners. And by the third portion it is enacted, that such instrument "shall also be deemed and taken to have had the like operation in "passing all the estate or interest of the mortgagors or other "persons executing the same, in the property, estate, or effects "comprised therein, or for all other the objects and purposes afore- "said, or intended to be effected thereby, except and subject as "aforesaid." So far is this provision from being, in my opinion, calculated to sustain the construction of the former part of the section for which the plaintiff contends, that it affords, as I think, a decisive argument against that construction. It is an *ex post facto* provision of the Legislature, giving force and operation to deeds and instruments formerly executed. It may have been just and reasonable that such a provision should be applied to cure any

(a) 10 H. of L. Cas. 191.

(b) 5 Ell. & Bl. 830.

(c) 1 C. B. 379.

infirmities of form which may have existed in instruments previously executed in pursuance of several provisions of various Acts of Parliament, composing a rather complicated code. But it would have been most unreasonable and unjust to give, to this *ex post facto* legislation, the effect, not only of creating rights which had not previously existed, but of displacing rights which had been previously vested and enjoyed. If, by any previous deed, a public company or other borrower had purported to convey property which the grantor had then claimed, but which, in the interval, and before the passing of the Act, had been the subject of direct adjudication (for example, in an ejectment at Law or by a decree in a Court of Equity), in favour of an adverse claimant, the effect of this section, upon the construction of it now contended for by the plaintiff, would be, to wrest that property from the successful claimant, and not only give it to the Commissioners, but give it to them subject to redemption of the grantors in pursuance of the proviso of redemption: which, according to this construction, would be one of "the other objects and purposes expressed" by the deed. Thus, not only would the property be taken away from the rightful owner, for the benefit of the Commissioners, but it would be taken for the benefit also of the wrongful claimant, from whom it had been rightfully recovered by the judgment of one of the regular tribunals of the land. If the Legislature had so enacted in clear words, we should have been bound to declare such to be their meaning. But it is impossible to give to the terms which we find in this section a construction which would impute to the Legislature the perpetration of such injustice, while a limited and reasonable construction can be given to these words. According to that construction, which we now adopt, this section will have the effect of giving to the deed such operation as the law would have given to it at the time of its execution, if it had been framed in due form according to the directions of the Commissioners; and the fact that it was executed to the Secretary of the Commissioners, is to be taken as conclusive evidence that the deed was so framed. Such operation it shall have, both as to the passing of the estate and interest in the property, estate, or effects comprised in it, and also for all the

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ANDREWS. objects and purposes expressed in the deed, other than the passing of the estate and interest in the property comprised in it. And those objects and purposes will not include the passing of property in which the Company had no estate or interest when the Company executed the deed, and which, according to the law of the land (which this section did not profess to alter), the Company could not have granted by any deed.

Of course we only deal with this instrument in reference to its legal operation; that is, with reference to its force and operation at law. Whether it is, or is not, within the authority of the case of *Holroyd v. Marshall* (a); whether it does, or does not, deal with "chattels and effects," to be subsequently acquired, by such a description of such chattels as to bring the goods in question within, or to place them without, the rule laid down by Lord Westbury in his judgment in that case, we pronounce no opinion. All that we now determine is, that the Commissioners, under the mortgages, had no property in the goods mentioned in the interpleader issue when they were seized under the defendant's execution; and, consequently, that the cause shown against the conditional order to enter a verdict for the plaintiff must be allowed.

Cause allowed.

(a) 10 H. of L. Cas. 191.

T. T. 1864.
Common Pleas.

BUTLER v. SMITH.

(*Common Pleas.*)

June 11.
 M. T. 1864.
 Nov. 11, 22.

THIS was an interpleader issue directed to try the property in certain goods and chattels, which had been seised by the Sheriff of the county of Kildare, under a writ of *fi fa*, issued in the cause of *Smith v. Burnell*.

The property seised consisted of a leasehold interest in a quarry, a quantity of stones lying in the quarry, and a crane.

The question in the case arose with respect to the leasehold interest. The case was tried before Mr. Justice Hayes at the Consolidated Nisi Prius sittings during Trinity Term. It appeared that the lands, the subject of the leasehold interest, formed part of the estate of Palmer's minors, and that an agreement for a lease for three years, from the 1st of March 1863, had been made by Master Brooke to Burnell: this agreement contained a proviso against sub-letting or assigning any part of the premises without the consent, in writing, of the Court or the receiver having been previously obtained. By a bill of sale, dated 1st of March 1864, Burnell assigned his interest under that agreement to Butler. The bill of sale had never been executed by Master Brooke, nor had any indorsement been made upon it, pursuant to the provisions of the 23 & 24 Vic., c. 154, s. 10. The solicitor for the receiver was examined on behalf of Butler, and stated that, in the month of February in the present year, Burnell had informed him that he (Burnell) had become insolvent and was no longer able to pay the

The 10th section of the Landlord and Tenant Act renders null and void an assignment of lands held under a lease containing a clause prohibiting assignment, where the assent of the landlord is not testified in the mode prescribed by that section.

A, a lessee of lands held under the Court of Chancery by an agreement containing a clause prohibiting assignment without the consent of the Master in Chancery or the receiver, assigned the lands to B without having obtained such consent testified in the mode prescribed by the 10th section, and the lands were after-

wards taken under an execution against A.

Held, that no interest passed under the assignment to B, and therefore that the lands were liable to be taken under an execution against A.

Seemle.—That, whatever may be the effect as between landlord and tenant of the landlord testifying his consent to the assignment, in the prescribed form, at a period subsequent to the date of the assignment, it cannot divest the intervening rights of third parties.

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rent reserved by the agreement of March 1863; and Burnell then applied to him to obtain the consent of the Master in Chancery to an assignment of the leasehold interest to Butler; and that, on the 2nd of March 1864, the witness applied to the said Master for such consent, which the latter then gave.

A letter dated the 3rd of March 1863, from the solicitor for the receiver to Burnell's attorney was read, stating that the Master's consent had been obtained, and assenting on behalf of the receiver to the assignment to Butler.

At the close of the plaintiff's case, Counsel for the defendant called on the learned Judge to direct a verdict for the defendant as to the leasehold interest in the quarry, on several grounds, of which the only one material to be stated was, that the assignment was illegal and of no effect, because it was made in violation of the clause against sub-letting or assigning contained in the agreement; and that no sufficient consent had been obtained from the Court or receiver entitling the tenant to make such assignment. His Lordship refused to direct the jury as required by the defendant's Counsel, but reserved the questions raised by the defendant for the consideration of the Court above. The jury found the issue in favour of the plaintiff.

On a previous day in this Term, *Sidney* obtained a conditional order that the verdict had for the plaintiff should be set aside, and a verdict entered for the defendant, pursuant to leave reserved.

Exham and *Gamble* now showed cause.

Sidney and *Concannon* in support of the conditional order.

Exham.

The words of the 10th section of the Landlord and Tenant Act are:—"Where any lease has been or shall be made, containing an agreement restraining or prohibiting assignment, the benefit of which has not been waived before the 1st day of June 1826, it shall not be lawful to assign the lands or any part thereof contrary to such agreement, without the consent in writing of the

“landlord or his agent thereto lawfully authorised in writing, T. T. 1864.
 “testified by his being an executing party to the instrument of *Common Pleas.*
 “assignment, or by an indorsement on or subscription of such **BUTLER**
 “instrument.” This section only affects the validity of the assign- **v.**
 ment as between the landlord and the assignee; and so long as the **SMITH.**
 landlord does not choose to take advantage of the invalidity of the
 assignment, it is good as between the assignee and third parties:
Doe d. Bryan v. Bancks (a).

From what has occurred in the present case between the
 solicitor of the receiver and Burnell, with the privity of the
 Master, it would be impossible to say that the latter could regard
 this bill of sale as a nullity.—[CHRISTIAN, J. That may be ground
 for a suit in equity to compel Master Brooke to testify his consent
 to the assignment in the form prescribed by the statute.]—Suppose
 Master Brooke brought an action against Burnell for a gale of rent
 accruing subsequently to the assignment, would it not be open to
 him to plead the arrangement between him and the solicitor of the
 receiver, with the privity of Master Brooke, as an equitable defence
 to that action?—[MONAHAN, C. J. Whatever the effect of that
 arrangement may be in a Court of Equity, whether it amounts to
 an agreement by the Master to do everything necessary to validate
 the assignment or not, in this Court it cannot bring the case
 within the 10th section of the statute.]

He cited *The Duke of Leinster v. Metcalf (b)*; *Smith's Land-
 lord and Tenant*, p. 303; *Troy v. Kirk (c)*; *Penny v. Gardiner (d)*.

Sidney and Concannon.

Nothing passed to Butler by this bill of sale. The words of the
 10th section of the Landlord and Tenant Act are, that “*it shall not
 be lawful* to assign the lands or any part thereof,” &c., without
 the assent of the landlord, testified as therein required. The effect
 of that section is, to render null and void every assignment requir-
 ing the assent of the landlord, unless that assent be testified in

(a) 4 B. & Ald. 401.

(b) 11 Ir. Law Rep. 365.

(c) Al. & Russ. 230.

(d) Al. & Russ. 345.

T. T. 1864. the form prescribed by the section. They cited *Gye v. Felton (a)*:
Common Pleas. *Woodfall's Landlord and Tenant*, 7th ed., p. 496.

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Gamble, in reply.

It is competent for Master Brooke now to indorse his assent on this bill of sale; that would have a retroactive effect, and set up the assignment from the day of its execution: *Walker v. Crumlin (b)*. Even under the old statute (7 G. 4, c. 29, s. 3), which provided not only that the consent of the landlord should be testified in the same manner as under the 10th section of the new Act, but also that any assignment, without the consent being so testified, should "be wholly void and invalid, to all intent and purposes whatever," it was held, that a consent, indorsed by the heir-at-law of the landlord, eleven years after the assignment, and after the death of the assignor and the transmission of his interest to his legal representative, was sufficient to validate the assignment: *Davis v. Davis (c)*. Those deriving under the assignor on his death in that case were as much third parties as the execution creditor of the assignor is here.

The 10th section only applies where the agreement against assigning contained in the lease, is, at the time of the assignment, in force and effect between the parties, and has not been waived. The agreement against assigning here was not under seal, and could be waived or varied by any writing between the parties; any writing between the landlord and tenant allowing a particular assignment would make the agreement cease to be "a lease containing an agreement restraining or prohibiting assignment," within the meaning of the 10th section. The letter from the receiver's solicitor, and the verbal assent to the assignment here, had that effect; and therefore the assignment from Burnell to Butler was valid. The letter was a sufficient waiver of the agreement against sub-letting, signified "by the authorised agent in writing under his hand," as required by the 43rd section of the Landlord and Tenant Act. It never was intended by the Act, that if there

(a) 4 Taunt. 876.

(b) 4 Law Rec., O. S. 115, 200.

(c) 4 Ir. Law Rep. 353.

was a lease by deed or writing prohibiting assignment, the parties should be precluded from making a new deed or writing to vary it by allowing assignment; and so here the writing prohibiting assignment was varied by the letter allowing assignment, and so took it out of the 10th section.

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Cur. adv. vult.

On this day **MONAHAN, C. J.**, delivered the judgment of the Court.

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Nov. 22.

MONAHAN, C. J.

This was an interpleader issue, directed to try the property in a quarry, and certain goods and chattels which had been seized and sold by the Sheriff, under an execution issued in the cause of *Smith v. Burnell*. The facts of the case appear to be these:—The property seized consisted of a quarry held by Burnell, as tenant under the Court of Chancery, and also of a quantity of stones in an unfinished state which had been raised from the quarry, and a crane which had been used in the quarry for the purpose of raising the stones, and which was of considerable value. It turned out on the trial that Butler had no right to the crane; and Mr. *Sidney's* client admits that Butler was entitled to the stones; and therefore the only substantial question which arose at the trial, and which now comes before us on the present motion, is this, whether, under the execution against Burnell, Smith was justified in seizing the quarry itself? That is now the only question, save as to the costs of the proceedings. The question as to the quarry arises in this way—it formed part of the estate of a minor, who was a ward of the Court of Chancery; and, in the month of March 1863, Mr. Burnell entered into an agreement to become tenant of the quarry for a term of three years from the 1st of March 1863, at a certain rent. There was a clause in that agreement that the tenant should not sublet or assign the premises, or any part thereof, without the consent in writing of the Master in the minor matter, or the receiver, having been previously had and obtained. That is the substance of the agreement. It appears that, on the 2nd of March 1864, Butler purchased Burnell's

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interest under that agreement, which was conveyed to him by a bill of sale; and on the same day he entered into possession of the quarry, and continued working it from that time until the seizure by the Sheriff. It appears also that Burnell, who had become insolvent, and not in circumstances to continue tenant to the Court of Chancery, applied to the solicitor for the receiver to obtain the sanction of the Master to the assignment to Butler; and some evidence was given that the Master had in fact sanctioned that transaction; but it is quite clear that no formal assent had ever been obtained from the Master, either by execution of the bill of sale or indorsement upon it. The only question, therefore, is this, having regard to the state of facts I have detailed, had Burnell, at the time of the delivery of this execution to the Sheriff, such an interest in the quarry as justified the Sheriff in seizing and selling it? or had Burnell's interest in the premises passed to Butler, either by assignment or otherwise, so as to prevent it being seized under an execution against Burnell?

That depends entirely on what is the true construction of the tenth section of the recent Landlord and Tenant Act, which has given rise to so many questions of difficulty. The words of the tenth section are these.—[His Lordship here read the section.]—It is perfectly clear that, if the formalities prescribed by that section were necessary to render this a valid assignment, it cannot be supported; for neither the Master nor the receiver was an executing party to it, or indorsed his assent upon it. The question then is, what is the proper effect to be given to the words of the section “it shall not be lawful to assign the lands,” &c., where there is a clause in the lease prohibiting assignment. Mr. *Bram* argued that this was a matter altogether between landlord and tenant; that the clause was introduced into the Act to regulate the relations of landlord and tenant, and that the rights of third parties were not affected by it; and he said that, if the Master chose at the present time to indorse his assent on this bill of sale, the tenant would be bound by it, and that it would be sufficient to take the property out of the tenant as against himself, his creditors, and subsequent assignees. The question therefore turning on the construction of

this Act of Parliament, it is the duty of the Court, not only in the present, but in all cases of a like description, to consider what the law was at the time of the passing of this Act of Parliament, and what change the Legislature intended to introduce by its provisions. Now this Act, as appears by the preamble, was passed to consolidate the existing law relating to landlord and tenant. What then was the law in this respect, as between landlord and tenant, before the passing of the Act? The first of the Subletting Acts was the 7 G. 4, c. 29.—[His Lordship here read the third section of the Act.]—It is to be observed that this section enacts that, unless the consent of the landlord be testified as therein provided, the assignment “shall be and be deemed wholly void and invalid, to all intents and purposes whatsoever.” I am not aware that there have been many decisions on that particular Act of Parliament; but we were referred to several cases upon the subsequent Act (the 2 W. 4, c. 17), which differed from the previous Act in this, that as to future leases no tenant could assign or sublet, unless there was a clause in the lease expressly authorising the tenant to do so; and the penalty for assigning or subletting without consent was, that the assignment or subletting should “be and be deemed null and void, to all intents and purposes whatsoever.” The recent Act alters the law merely in this respect, that, where the lease is silent as to subletting or assigning, the tenant has the ordinary rights which he would have had at Common Law; but where the lease contains a clause restraining alienation, the lease shall be null and void, unless the consent of the landlord be testified in the way prescribed by the tenth section. This view of the section is confirmed when we consider the policy of the Act, and that, unless the assignment be absolutely null and void to all intents and purposes, as between the parties thereto, there would be no mode of giving to the landlord the benefit of the section; for there is no clause of forfeiture in the Act; if there were, or if penalties were attached to an assignment without consent, one could understand that the section was introduced for the benefit of the landlord, and that if he did not choose to take advantage of the forfeiture or the penalties, no one was to blame but himself. The recent Act of Parliament repeals

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altogether the Act of 2 *W.* 4, except the first section; and it preserves the Act of 7 *G.* 4, as to existing leases made between the 1st of June 1826 and the 1st of May 1832, but repeals it as to all other leases. The words of the tenth section are "that," when there is a clause in a lease prohibiting assignment, &c., "it shall not be lawful "to assign the lands, or any part thereof, contrary to such agreement, "without the consent in writing of the landlord or his agent thereto "lawfully authorised in writing, testified by his being an executing "party to the instrument of assignment, or by an indorsement on or "subscription of such instrument." It occurs to us that it is impossible to give those words any reasonable construction but this—that the Legislature intended by that clause to re-enact substantially the same provisions as were enacted by the statute of *W.* 4. Unless we give this section the force of annulling altogether the transaction between the parties, it would be impossible to give the landlord the benefit of it; for if the tenant chooses to assign, the assignment will pass the interest under the lease, which then becomes the property of the assignee, who becomes the legal tenant of the landlord, and is not liable for any breaches of covenant occurring before the assignment. It was to get rid of that difficulty, and to render it impossible for the tenant to assign without the consent of the landlord being given in the way prescribed, that the tenth section was passed; and, accordingly, unless the assignment be with the consent of the landlord, testified in the way prescribed by that section, no interest passes; and if no interest passes, of course the property remains vested in the original tenant, and is liable to be seized under an execution against him.

It was argued that, as there was no time limited by the Act within which the consent of the landlord was to be given, it might be given long after the assignment. That may be so; and if things still remained as they were at the date of the assignment, there perhaps would be nothing to prevent the Master validating the instrument at the present time. But then the rights of third parties would not have intervened. In *Walker v. Crommelin* (a) the rights of third parties did not intervene; and in *Penny v. Gardiner* (b)

(a) 4 Law Rec., O. S. 104.

(b) Alc. & Nap. 345.

it was held that, although there may have been a verbal assent on the part of the lessor, until he had bound himself by the form of assent prescribed by the statute, the property remained vested in the original tenant, and was liable to be seized under an execution against him; and that the moment it was seized the rights of his creditors intervened; and it was impossible for the landlord, by any consent, to divest those rights. And so, in the present case, although it might have been competent for the Master, at any distance of time, where the rights of third parties did not intervene, to validate this bill of sale, by giving his consent to it in the form prescribed by the tenth section, yet it is our opinion that the property remained in the original tenant, and was liable to be seized under an execution against him; and that when the seizure was made, it was then too late to divest the property by any form of consent whatever. The only other question is, as to the costs of these proceedings. It appears that all parties were in the wrong. Smith claimed the property in the stones, which claim he afterwards abandoned; and Butler abandoned his claim in relation to the crane; so there is nothing in dispute except the leasehold interest in the quarry.

We therefore think that each party should bear his own costs of the interpleader, and of the other proceedings incident thereto.

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*Exchequer Chamber.**

BUSTEED Plaintiff in Error; CHUTE Defendant in Error.

April 26, 27,
 28.
 June 26.

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"The Landlord and Tenant Law Amendment Act Ireland, 1860," 23 & 24 *Vic.*, c. 154, is not retrospective; consequently covenants contained in fee-farm grants, made before it came into force, viz., the 1st day of January 1861, are not affected by it.

Chute v. Busteed (15th Ir. Com. Law Rep. 115), overruled.

PIERCE CHUTE made a fee-farm grant to John M'Carthy in the year 1826, of mill premises. The fee-farm grant contained a covenant by the grantee to keep and deliver up the mill in good repair. The mill was burned, and the plaintiff brought an action against Busteed, the assignee of M'Carthy, for breach of the covenant to keep the mill in repair. The summons and plaint stated (by order of the Court), that prior to the breach, and prior to the passing of the 23 & 24 *Vic.*, c. 154, the interest of the grantor had vested in the plaintiff, and that of M'Carthy in the defendant.

The defendant demurred to the summons and plaint. First; because no privity of contract was thereby shown between the plaintiff and defendant; and because it did not thereby appear that the defendant was liable on the contracts or covenants entered into by John M'Carthy. Secondly; because it did not sufficiently appear that the plaintiff was entitled to sue on the contracts or covenants entered into with Pierce Chute; and that it did not appear that the defendant was liable or accountable to the plaintiff for the breach of covenant therein mentioned.

The Court of Exchequer overruled the demurrer, and held, that fee-farm grants came within the scope of the Landlord and Tenant Amendment Act (Ireland) 1860; 23 & 24 *Vic.*, c. 154.

The Court of Exchequer also held (Pigot, C. B., *dissentiente*), that fee-farm grants executed prior to the passing of that statute

* *Coram* LEFROY, C. J., MONAHAN, C. J., KEOGH, O'BRIEN, HAYES, FITZGERALD, and O'HAGAN, JJ.

are affected by its provisions. The LORD CHIEF BARON was of opinion that there were not sufficiently clear indications of the intention of the Legislature to give a retrospective operation to the statute.

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The case now came before the Exchequer Chamber upon a suggestion of error.

Charles Barry (with whom was *Robert Ferguson*) for Busteed, the plaintiff in error.

Fee-farm grants do not come within the provisions of the 23 & 24 *Vic.*, c. 154. Assuming that fee-farm grants come within the language of the third section of the latter statute, that section does not apply to fee-farm grants made prior to the passing of that statute; and, further, assuming the statute to apply to fee-farm grants, it does not affect the assignees of fee-farm grants.

This action is grounded upon the assumption that the twelfth section of the statute in question is retrospective; in proof of that section being retrospective, the language of the third and fourth sections is relied upon—*i. e.*, it is contended that a fee-farm grant is “a contract of tenancy,”—that the relation of landlord and tenant is created by a fee-farm grant,—and that “shall be deemed to be” gives a retrospective force to the third section. But the latter words have a prospective operation in the sixteenth section, and the rule of law is, that a statute cannot be retrospective unless distinctly expressed to be so: *Moore v. Durdan* (a); *Williams v. Smith* (b); *Jackson v. Woolley* (c); *Thompson v. Lack* (d); *Marsh v. Higgins* (e). Such being the rule of law, what is there to make the 23 & 24 *Vic.*, c. 154 retrospective? It is not a consolidation of the Acts relating to Landlord and Tenant, as is manifest from the heading of schedule (B), setting out the Acts of Parliament repealed. It runs thus:—“Acts and parts of Acts repealed so far as the same relate to the relation of Landlord and Tenant in Ireland, and as by the foregoing Act is declared.”

(a) 2 *Exch.* 22.

(b) 4 *Hurl. & Nor.* 559.

(c) 8 *Ell. & B.* 784.

(d) 3 *Com. B.* 540.

(e) 9 *Com. B.* 551.

E. T. 1865. If the Act of 1860 be the sole code regulating all the relations between landlords and tenants in Ireland, then the 11th section is unintelligible, for it enacts that assignments made *after* the passing of this Act shall be governed by 2 *W.* 4, c. 17, s. 9. The same reasoning applies to the forty-sixth section, which is still partially governed by an Act of *G.* 3.

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It may be also contended, that the third and twelfth sections are retrospective, because some of the sections of this Act are retrospective and others are prospective. But when any section of the statute in question is intended to be prospective, it is clearly expressed to be so: *vide*, the fourth, fifth and eighth sections. If this statute was intended to be a code, there was no necessity for introducing in the eighth section the words, "made before or after the passing of this Act." The 10th section is both retrospective and prospective. The 11th section is a virtual enactment of the old law as to covenants being binding upon assignees. There is nothing in the 12th section to make Busteed, the plaintiff in error, liable for what he was not liable to when this Act passed. It will be contended that, "holden," in the 12th section means, "held at the time the Act came into operation;" but the same word, "holden," is clearly prospective in the 26th section. The 14th section, which deals with the same subject matter as the 12th, is clearly prospective. The 15th and 16th sections are prospective: the 18th section is both retrospective and prospective: the 19th and 20th are prospective only. Assuming that fee-farm grants are within the statute, the assignees of fee-farm grants are not affected by it. All the sections which deal with the rights and liabilities of assignees are prospective. The ninth and tenth sections do not vary the liabilities of the parties to this action; but the 11th, 12th, 14th, 16th, 18th, 19th and 20th sections are expressly prospective where they deal with the rights of the assignees of the original contracting parties. Fee-farm grants are not within the operation of this statute, because they are not estates of freehold, within the fourth section of the Act; nor does the relation of landlord and tenant, within the meaning of the third section, exist between the grantor and grantee in a fee-farm grant: *Lessee of Porter v.*

French (a). "Freehold" in the fourth section is used in distinction to "leasehold;" it there means "estates held for life, or some uncertain interest:" *Watkins on Conveyancing* (White's ed.), c. 4: *Shelford on Real Property*, p. 126. If fee-farm grants be estates of freehold, upon the death of the grantee, intestate, his interest and estate according to the terms of the ninth section, would pass to his personal representative, which is absurd. The meaning of the words "undisposed of" is explained by the first and third sections of the Wills Act (1 Vic. c. 26); and therefore the ninth section applies only to estates *pur autre vie*, and their devolution is not affected by this statute, where there is no special occupant. Fee-farm grants are first mentioned in the 25th and 52nd sections; why would they be expressly mentioned if the Legislature had deemed they were included within the third and fourth sections? Tenancies from year to year are expressly mentioned in the 52nd section, because that section first enabled an ejectment for non-payment of rent to be brought upon that tenancy. If the Legislature intended to deal with fee-farm grants, why did they leave unrepealed all the Acts which relate to them,—viz., 11 *Anne*, c. 2, s. 7; 12 & 13 Vic., c. 105, ss. 20 and 22; re-enacted by the 14 & 15 Vic., c. 20? The 10th and 18th sections are both prospective and retrospective; but "lease" in the 10th section cannot include "fee-farm grants," *Musgrave v. M'Cullagh* (b); as such a grant containing a covenant against alienation without license is void: *In re Quin* (c). The third section of this Act has been held not to be retrospective: *M'Areary v. Hannan* (d). So also has the 44th section: *Mercer v. O'Reilly* (e).

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The *Solicitor-General* (*E. Sullivan*), *H. P. Jellett*, and *J. C. Neligan*, for the defendant in error.

The Landlord and Tenant Amendment Act (Ireland) 1860 is retrospective, and applies to fee-farm grants. It is admitted that at Common Law, irrespective of Statute, the relation of landlord

(a) 9 Ir. Law Rep. 541.

(b) 14 Ir. Com. Law Rep. 498.

(c) 8 Ir. Chan. Rep. 579.

(d) 13 Ir. Com. Law Rep. 70.

(e) 13 Ir. Com. Law Rep. 153.

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and tenant is not created between the grantor and grantee in a fee-farm grant. It has been contended that in the fee-farm grant before the Court there is no contract to hold from the grantor himself; but the grantor purported to "demise," and that word implies a covenant for quiet enjoyment, and that the grantee should enjoy the full term purported to be granted: *Burnett v. Lynch (a)*. Covenant will lie upon the word "demise"—*per* Littledale, J. An action of ejectment for non-payment of rent has been given by the 52nd section upon every fee-farm grant, whether made before or after the passing of the Act of 1860. "A contract of tenancy" must be therefore implied in the word "demise"; consequently a fee-farm grant is "a contract of tenancy." The object of the Act of 1860 was to abolish the necessity of a reversion in actions for non-payment of rent and of ejectment. The word, "fee-farm grant," is used as synonymous in the "contract of tenancy" in the 52nd, 64th, 70th, and 71st sections. In the 25th section a proviso is expressly introduced to prevent the provisions of that section applying to every fee-farm grant made before the passing of the Act. The course of legislation relative to fee-farm grants is worth attention.—First, there were leases for lives renewable for ever; then came the Renewable Leasehold Conversion Act (12 & 13 Vic., c. 105), by which those leases can be converted into grants in fee. Although an estate in fee is thus created, yet the grantee remains subject to rent-service, and all the liabilities of a tenant under an ordinary lease. The 14 & 15 Vic., c. 20, was passed for the express purpose of extending the provisions of the 12 & 13 Vic., c. 105, to leases for lives renewable for ever made before that Act—*i. e.*, fee-farm grants were put upon the same footing as leases, as regards rent. The 14 & 15 Vic., c. 20, has been held to be retrospective: *Major v. Barton (b)*. By the Renewable Leasehold Conversion Act, all feudal notions of a fee-farm grant were abolished; and, save that no action of ejectment for non-payment of rent lay, the covenant to pay rent cast a personal liability on the grantee. The 52nd section of the Landlord and Tenant Act 1860 was passed to fill up the blank left, and gives

(a) 5 B. & C. 609.

(b) 2 Ir. Com. Law Rep. 28.

a remedy, by ejectment for non-payment of rent, on fee-farm grants. If the 52nd section does not apply to contracts of tenancy made before the passing of the Act in question, the position of grantors of fee-farm grants is not an enviable one. If the 52nd section applies to leases made before the 1st of January 1861, it must apply also to fee-farm grants. If the Legislature intended to exclude fee-farm grants from the operation of the Landlord and Tenant Act 1860, it would have been expressly so stated; and undoubtedly the plaintiff in error under this construction of the Act will have a new liability imposed upon him; but that is not unusually the result of legislation: *Tulk v. Mozhay (a)*. This Act has not been declared to be prospective *only*; and many statutes have been held retrospective: *Towler v. Chatterton (b)*; *The Ironsides (c)*; *Bradshaw v. Tasker (d)*. A "contract of tenancy" must be implied wherever there is a holding by one person from another; and, construing the word "lease" by the interpretation clause, and by the 52nd section, fee-farm grants are clearly within the statute. The words, "shall be deemed," in the third section, are to be read as if the words "when-ever the question arises" were understood. The 12th section has been held to be retrospective: *Mercer v. O'Reilly (e)*. Why are some sections of this statute made expressly prospective (*e. g.*, the 11th), unless the statute was intended to be retrospective, save when declared to be otherwise?

The 25th, 27th, 28th, and 38th are expressly prospective. Is the law of set-off between landlord and tenant prospective or retrospective? It cannot apply to contracts made before the Act if the 48th section is not retrospective. Some sections apply expressly to instruments made either before or after the passing of the statute, viz., the 8th, 10th, 18th.

Charles Barry, in reply.

The sections which the defendant in error construes as retrospective are not so in reality. The cases relied upon by the other side

(a) 2 Phillips, 774.

(b) 6 Bing. 258.

(c) 1 Lush. Adm. Rep. 465; S. C., 31 Law Jour., Prob. & Adm. 129.

(d) 2 Myl. & K. 221.

(e) 13 Ir. Com. Law Rep. 153.

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E. T. 1865. relate to matters of procedure only. So far from the retrospective
Exch. Cham. imposition of liabilities being uncommon, the sixth section of the
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v. 11 *Anne*, c. 2, was made expressly prospective.

BUSTEED. The 104th section in terms preserves the remedies and rights given by the old statutes where necessary. Fee-farm grants only come within the operation of the 52nd section when made after a contract of tenancy has been entered into between the parties—*i. e.*, the rights of an assignee in a fee-farm grant made before the statute are still regulated by the old law.

O'HAGAN, J.

T. T. 1865. This case comes before the Court upon a suggestion of error
June 26. in the judgment of the Court of Exchequer disallowing the demurrer of the defendant to the summons and plaint, which was shaped under the direction of that Court, to raise clearly or simply the important question with which we have now to deal. Its allegations are that, by an indenture of the 31st of March 1826, one Pierce Chute demised a mill and other premises to one John M'Carthy, to hold to him, his heirs and assigns, for ever, the said John M'Carthy covenanting for himself, his heirs, executors, administrators, and assigns, that he and they "should and would, "from time to time, and at all times thereafter during the continuance of the said demise, preserve, uphold, support, maintain, "and keep the said demised premises, and all improvements made "and to be made thereon, in good and sufficient order, repair, "and condition, and at the end, surrender, or sooner determination "of the demise, to leave and yield up the same to the said Pierce Chute, his heirs, executors, administrators, and assigns." The summons and plaint goes on to aver that, before the breaches of covenant thereafter mentioned, or any of them, were committed, and before the passing of the Landlord and Tenant Amendment Act (Ireland), all the estate of the said Pierce Chute in the premises became, and at the time of the committing of the said breaches was, and still continued, duly vested in the plaintiff; and one moiety of the estate and interest of the said John M'Carthy had become, and was and continued vested in the

defendant. The breach is stated in these terms:—"The defendant, T. T. 1865.
 "during the continuance of the said lease, and whilst he was *Exch. Cham.*
 "such assignee as aforesaid, broke the covenant, in this, that he *CHUTE*
 "did not, during the continuance of the said demise, and whilst *v.*
 "he was such assignee as aforesaid of said premises, uphold, *BUSTED.*
 "support, maintain, and keep the said moiety of the said pre-
 "mises, and the improvements made thereon, in good and sufficient
 "order, repair and condition; but, on the contrary, whilst the
 "plaintiff and defendant were such assignees as aforesaid, and
 "during the said term, and before the passing of the before
 "mentioned Act, the entire of the said dwelling-house and pre-
 "mises became and were, and from thence hitherto have continued
 "to be, and now are, burnt down, dilapidated and destroyed, to
 "the damage of the plaintiff, in respect of his estate in the said
 "moiety, of the sum of £3000."

This condition of things is apparent upon the allegations of the summons and plaint:—that the grant relied on was a grant in fee reserving rent—in other words, a fee-farm grant; that the covenant relied upon was that of the grantee, to keep the mill and premises in repair; that the rent was assigned, and the interest of the grantee was also assigned before the passing of the Landlord and Tenant Amendment (Ireland) Act 1860; that the covenant was broken before the passing of that statute, though it is a continuing covenant; and the breach is legally assigned as a continuing breach; and that the action is sought, under these circumstances, to be maintained by the assignee of the rent against the assignee of the grantor. The grant having established the tenure between the parties, and the grantor having reserved no reversion to himself, it is clear, and has not I think been disputed, that before the passing of the Landlord and Tenant Act this action could not have been successfully maintained. The question therefore is, whether that Act is to be held to operate retrospectively, as to the subject-matter of the action, and to create rights and impose liabilities which had no existence at the period of its passing, and were not in the contemplation of the grantor and grantee when the grant was executed, or of the persons deriving

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under them, when the subsequent assignment vested in them, respecting the premises and the rent? It is insisted, on the part of the plaintiff, that the twelfth section of the Act, taken in connection with the third, has this remarkable effect—and the Court of Exchequer has so decided in disallowing the demurrer. The twelfth section provides that “Every landlord of any lands holden “under any lease or contract of tenancy shall have the same action “and remedy against the tenant and the assignee of the estate “and interest, or their respective heirs, executors, or administrators, in respect of the agreements contained or implied in such “lease or contract, as the original landlord might have had against “the original tenant, or his heir or personal representative respectively.” For the purpose of maintaining the case of the plaintiff, we must hold that the section is retrospective in its operation, and that it affects fee-farm grants, and fee-farm grants executed before the passing of the Act; and, in order to come to this conclusion, we must further show that the third section is also retrospective, and operates upon fee-farm grants, so as to establish the relation of landlord and tenant between the grantee and grantor, with all its incidents, though such a relation was never contemplated by them, and formed no part of the basis of their contract with each other. It is manifestly difficult to exaggerate the importance of the question to the proprietors of land in Ireland; so much of it is held under instruments like that which we are considering; and, so greatly must the value of it be affected, in a multitude of instances, if the judgment of the Court of Exchequer be affirmed. I proceed to consider the grounds of that judgment, as presented in the argument for the plaintiff at the Bar. The Landlord and Tenant Amendment Act is a very ponderous piece of legislation, not quite homogeneous in all its parts, or easy of construction in all its provisions; many of the sections are expressly prospective—many of them expressly retrospective—many of them in terms both prospective and retrospective, and many equivocal, from the absence of words distinctly pointing to the past or to the future. I shall not go through those in detail, as was elaborately done in the course of the argument, but numerically, in reference to the

distinctions there indicated; they stand apparently thus—six sections are in terms prospective and retrospective; twenty-four are in terms prospective; and seventy-five have no terms making them expressly either retrospective or prospective. The twelfth section properly ranges itself in the last of the classes; its terms are equivocal; it does not contain, like the eleventh section, the words “after the passing of the Act;” nor has it words pointing clearly to the future, as the sixteenth section, which begins, “From and after any assignment *hereafter* to be made.” We have had much minute criticism upon it on both sides, with which I do not deem it necessary to coincide or to quarrel; for I think that this section may be held, in a certain sense, and to a certain extent, to be retrospective, and yet the controversy as to its operation on fee-farm grants generally, and especially on fee-farm grants executed before the enactment of it, may remain undetermined. In the case of *Mercer v. O'Reilly* (a), decided by the Court of Common Pleas, and affirmed, on the point which is material here, in the Exchequer Chamber, it was held that the 44th section of the Act, providing that the surrender to, or redemption by a landlord, or eviction of any portion of the premises demised by a lease, shall not in any manner prejudice or affect the rights of the landlord, whether by action, or entry, or ejectment, operates on contracts of tenancy made *prior* to the passing of the Act, as to breaches occurring *after* the passing of it. I think that that decision, and the reasoning on which it was founded, go very far to establish that, as to ordinary contracts between landlord and tenant, though made before the passing of the Act, the twelfth section may have, in a sense, a retrospective operation. In this respect I see no reason for a different rule as to the one section and the other. But, though it be the same as to both, that rule in no way concludes the question here. There seems to be a well-established distinction between Acts which meddle with existing rights, and those which are concerned with the remedies by which such rights may be enforced. Where procedure is dealt with by legislation, it is held that such legislation applies to cases arising either before

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or after the passing of the statute. The cases of *Freeman v. Moyes* (a), *Grant v. Kemp* (b), and others, establish this principle; and they and it were discussed in the case of *Wright v. Hale* (c), in which it was sustained by the judgment of the Court of Exchequer in England. Upon this principle it will be quite possible to hold very many of the sections of the Landlord and Tenant Act retrospective, in perfect consistency with the decision which should I think be pronounced upon the case before us; and with such consistency we might hold the twelfth section, as the 44th, retrospective, if it was necessary to determine the point at present. For the purposes of the case, however, that determination becomes unimportant, in the view which I take as to the operation of the third section of the statute. The twelfth can have the operation for which the plaintiff contends, only if the third be held to affect fee-farm grants, and fee-farm grants antecedently executed. If it be not so held, the parties to the deed were not "the original landlord" and the "original tenant" contemplated by the twelfth section; and it created no contract of tenancy on which "the landlord" could have his action against "the tenant" or "the assignee," within the meaning of that section. I am of opinion, after the best consideration I have been able to give the matter, that the third section is not retrospective, and does not affect fee-farm grants executed before the framing of the Act. There can be no doubt that the question here is of substantive right, and not of mere procedure; and we are asked to place the parties in a totally new position, and *ex post facto* to create a liability which they never designed to accept or to impose. Now, it is established that, although such a liability *may* be created by the strong exercise of legislative power, its creation must be evidenced by the clearest and most unequivocal language before any Court can assume that the Legislature intended to create it, and this on the plainest grounds. It is inconsistent with equity and reason, in ordinary cases, that persons who contract with each other should not have their

(a) 1 A. & E. 338.

(b) 2 C. & M. 636.

(c) 6 H. & N. 227.

contract enforced, according to their mutual purpose, but should have one wholly different invented for them by a statute passed years after the bargain was complete. The sense of mankind has always revolted against such legislation. It was evidenced by a fundamental maxim of the Roman code, very much in effect the same as that "rule and law of Parliament" stated by Lord Coke (a), and relied on in the argument—"*Nova constitutio futuris formam imponere debet, non præteritis.*" And this principle of construction has been adopted by all our Courts, and is supported by a host of authorities which are familiar to us, and need not be detailed. It is described by Lord Wensleydale—*Moon v. Durdin* (b)—as a principle "deeply founded on good sense and strict justice." Lord Cranworth, V. C., says:—"It is of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively." And Chief Justice Erle—*Midland Railway Company appellant, Pye respondent* (c)—presents it thus:—"Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the Legislature that it should be so construed is expressed in plain, clear, and unambiguous language; because it manifestly strikes our sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment. Modern legislation has almost entirely removed this blemish from the law; and, wherever it is possible to put upon an Act of Parliament a construction not retrospective, the Court will always adopt that construction."

Now, looking at the language of the third section of the Landlord and Tenant Act in the light of this principle, I cannot discern anything compelling us to put upon it a construction which must "shock one's sense of justice" and work manifest wrong in the case before us and very many others. In the first place, I observe

(a) 2 Mot. 292.

(b) 2 Exch. 22.

(c) 10 C. B., N. S. 198.

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that there are in it no expressly retrospective words—"plain, clear and unambiguous"—such as are used in other sections of the statute, where it was designed that those sections should have an *ex post facto* operation. This being so, is it not fair to assume—the matter in hand being of great importance, and the construction contended for very inconsistent with natural justice,—that the Legislature omitted such express words because it did not intend to produce the wrongful result which they would have made unavoidable? But, further, considering carefully the words which *have* been used, do any of them coerce us to the construction contended for? I repeat them:—"The relation of "landlord and tenant shall be deemed to be founded on the express "or implied contract of the parties, and not on tenure or service; "and a reversion shall not be necessary to such relation, which "shall be deemed to subsist in all cases in which there shall be an "agreement by one party to hold land *from or under another*, in "consideration of any rent." It seems to me that the words of the section naturally point to the future and not to the past. The words "shall be deemed" are at least capable of being applied in either way, and such words have been expressly held not to be sufficient to compel a retrospective construction: *Hitchcock v. Way* (a); *Thompson v. Lack* (b). And it is enough for the argument I am adopting, if the phrase be ambiguous; and afford us therefore the opportunity of construing in accordance with justice and the reason of the thing. Again, the words "and a reversion *shall not* be necessary to such relation," taken in connection with those which follow, "in all cases in which there shall be an agreement," seem to me more prospective than retrospective in their scope and import; and, at the lowest, are not retrospective so clearly and unambiguously as to coerce us to give them an *ex post facto* operation. I am, therefore, of opinion that whether the section has or has not reference to fee-farm grants generally, it should not be held to affect such grants, if executed before the passing of the Act. And this is enough to carry the consequence that the 12th section cannot aid the plaintiff; and, therefore, that the

(a) 6 Ad. & Ell. 943.

(b) 3 C. B. 540.

judgment of the Exchequer was wrong and ought to be reversed; that it has been further and, in my opinion, necessarily argued that the third section should not be held to affect fee-farm grants at all. When in the 25th and 52nd sections the Legislature designs to deal with such interests, it says so, and uses the word "grant" expressly. Why should it have done otherwise in passing the third section, if the section also was meant to apply to a fee-farm grant? Again, the third section declares that the relation of landlord and tenant shall be deemed to subsist only in cases "in which there shall be an agreement by one party to hold land *from* or *under* another in consideration of any rent." Now, the statute of *Quia Emptores* is not repealed by the Landlord and Tenant Amendment Act; and the grantee in such a case as that before us does *not* hold in fee under the grantor. He holds, not under the grantor, but under the superior lord; and, therefore, his position does not come within the description of the cases affected by the section in which "there shall be an agreement by one party to hold land *from* or *under* another." The grantee never agreed to hold *from* or *under* the grantor; the assignees of the grantee never agreed to hold from or under the assignee of the grantor; and, therefore, the very terms of the section mean to exclude from its operation such grants as this, in which the condition of that operation—the agreement to hold *from* another—has no existence. I should, on these grounds, hold, if it were necessary, that fee-farm grants generally are not affected by the section; but it is sufficient for the purposes of this judgment to determine that they are not affected by it retrospectively. I do not think it needful further to discuss in detail the arguments which have been presented on either side. The judgment of the Court of Exchequer appears to have gone very much upon the view that the Landlord and Tenant Act constitutes a code consolidating and amending the laws relating to landlord and tenant, and that it should be presumed, save where otherwise expressly provided, to apply to all contracts connected with their relation, whether before or after the passing of it. On this, I shall only observe—first; that the Act cannot, in my mind, be said to constitute within itself a

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complete code, so as to dispense with the consideration of the principles of law which were in force at the time of its enactment, and are still in force, notwithstanding its operation. There are very many cases in which it distinctly applies a different rule as to the transactions of the past and of the future, and there are some which it leaves unequivocally to be dealt with by the antecedent law. It is not, therefore, in my judgment, right or reasonable to suppose that it meant so comprehensively to affect *all* the relations of the owners and occupiers of the soil, that all of them, including that created by the fee-farm grant, must be assumed to be affected by it; and I should think it still less right or reasonable, if, proceeding on this groundless assumption, we should further proceed to reverse the established rules of construction in its regard—as ancient as they are wise, as universal as they are equitable,—and presume in favour of its retrospective operation, in the absence of express words to the contrary, instead of making the very opposite presumption, and holding its provisions prospective, save when we are forced by the plainest and most unequivocal language to hold that they are *not*.

For the reasons I have given, I think that the judgment of the Court of Exchequer should be reversed and the demurrer of the defendant allowed.

FITZGERALD, J., concurred with O'HAGAN, J.

HAYES, J.

We are called upon here to say whether the 12th section of the Landlord and Tenant Act is prospective or retrospective. But it would be well, in the first place, to settle clearly whether those words are to apply to the contracts, or to the cases arising upon the contracts, or to the remedies to be applied to those cases. As to the first, it would be extraordinary if an Act, which in its third section declared that the relation of landlord and tenant should thereafter be deemed to be founded on contract, should expressly or impliedly exclude from its operation every contract that had theretofore been made on the subject and was then in course of performance. The case of *Mercer v. O'Reilly (a)*, already before

(a) 13 Ir. Com. Law Rep. 153.

this Court on Error from the Common Pleas, and indeed almost every case reported upon the Act, shows that contracts of tenancy entered into before the statute, as well as those made since its enactment are within its operation (a). But taking it as clear that contracts made prior to the Act are within its operation, the next question is, whether cases upon such contracts, and which have arisen before the Act, are at all within the Act? This question is more difficult, and requires a more particular notice in reference to the case now before us. The contract dates from the year 1826, and by it Pierce Chute demised to John M'Carthy a dwelling-house, mill and premises, to hold in fee-farm, at a certain rent payable half-yearly; and M'Carthy covenanted for himself, his heirs and assigns, to keep and deliver up the premises in good repair. Afterwards, and prior to the Act, the interest of the grantor became vested in the plaintiff, and that of the grantee in the defendant. The breach of covenant complained of in the plaint is, the defendant's not *keeping* the mill in repair whilst he was assignee, it having been previously burned.

A preliminary question has been raised, whether a fee-farm grant, such as existed before the Renewable Leasehold Act, is at all within the 12th section of the Landlord and Tenant Act. In my opinion it is: the Act proposes to consolidate and amend the laws, and not any particular branch of the laws, relating to landlord and tenant in Ireland. The word "landlord" is interpreted to include the person entitled in possession to the estate of the original landlord *under any lease or other contract of tenancy*; which, by the third section, is "deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another, in consideration of any rent." "And a reversion shall not be necessary for such relation." The expression "perpetual interest" is also interpreted to comprehend, "in addition to any greater interest, any lease or *grant* for one or more lives, or for years absolute or determinable on one or more lives, with a

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(a) *Pentland v. Murtagh* (12 Ir. Com. Law Rep., App. ii); *M'Areavy v. Hannan* (13 Ir. Com. Law Rep. 70); *Bell v. Bell* (13 Ir. Com. Law Rep., App. xlvii).

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"covenant for perpetual renewal of such lease or grant." From the language of these interpretation clauses, I think it plain that the Legislature meant to include the contracts set forth in the old fee-farm grants, such as we have now before us; and that in legislating on such contracts, the word landlord is to include the person entitled to the estate of the original grantor; and the word tenant is to mean the person entitled to any lands under any lease or other contract of tenancy.

The 25th section, under the terms "perpetual interest under any grant," is plainly conversant with fee-farm grants; and the proviso which introduces a restriction in respect of those under the "Renewable Leasehold Conversion Act" show that the others were also before the mind of the Legislature. So also the 52nd section gives the remedy by ejectment whenever a year's rent shall be in arrear in respect of lands held under *any fee-farm grant*, lease, or other contract of tenancy. Upon the whole then, I entertain little doubt that the large and general terms used in the 12th section embrace the cases of fee-farm grants other than those referred to in the Renewable Leasehold Conversion Act. It has been urged that as the statute of *Quia Emptores* is still unrepealed, it cannot be said that the grantee in fee-farm holds under any one but the Crown or other chief lord; and therefore fee-farm grants cannot be included in the Act. This might have been a serious objection so long as the law of landlord and tenant was regulated by and founded upon tenure, by which the tenant became liable to fealty or services as an incident; but now that the whole is but a network of contracts, the expression as to lands in fee-farm *being held under any person* is resorted to, for want of a more appropriate phrase, to designate the person with whom the party entitled to the lands has entered into a contract for payment of the rent or other compensation.

To the plaint, setting forth the facts I have already adverted to, the defendant has demurred, and he insists that, as the assignee of John M'Carthy the original grantee, he is not liable for any breaches of the covenant entered into by M'Carthy with Pierce Chute, for which any other assignee of the grantee before the Act

would not have been liable. The 12th section enacts in brief, that "every landlord shall have the same action and remedy against the tenant and the assignee of his estate, or their respective heirs, in respect of the agreements contained or implied in the contract of tenancy, as the original landlord might have had against the original tenant or his heir respectively." Until the above section became law, it is quite clear that no person to whom the interest of the grantee in fee-farm was or would thereafter be assigned would thereby incur any liability on the covenant entered into by the grantee for keeping the premises in repair; and this exemption from liability would no doubt greatly influence the proceedings of persons negotiating for such assignment. And it is needless to remark that such a liability which, by the passing of the Act, was *eo instanti* imposed on all persons who had completed their contracts, without any notice of the coming burden, might be reasonably complained of and resisted as an interference with the principles of justice and good faith which should always belong to contracts, and which are so confidently looked for that nothing less than coercive language of the Legislature would justify the Court by its construction to disappoint that expectation. But in truth the clause is conversant only with "action and remedy" for breaches of the contract, and not with any variation of the rights or liabilities of the parties to antecedent contracts. In the case of *Mercer v. O'Reilly* it has been already held by this Court, while administering the remedy thereby provided for non-payment of rent under a contract made before the Act, that such remedy did not apply to the rent which had accrued due before the Act, but only to that which had accrued due subsequently. So, acting in analogy to that case, I think the action and remedy provided by the 12th section ought not to be applied to cases of assignment before the Act, but only to those which occurred after the Act; so that the rights of persons claiming under the contract of assignment might not be unduly or unjustly interfered with. In short, I understand the 12th section merely to say that for the enforcement of any right which the landlord now has or shall hereafter have against the tenant or his assignee, he shall have the same action and remedy as the original

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landlord might have had against the original tenant; but it gives no new rights in respect of bygone assignments upon which that remedy was to operate. Under the covenant by the grantee in the original fee-farm grant, the grantor had as against the assignee of the tenant no such right as is here claimed. This not being a covenant running with the land, the burden of it did not extend further than the covenantor and his representatives; and the section of the Act ought not to be so construed as to interfere with the rights of parties to contracts of assignment which have been made previous to its passing.

I am, therefore, of opinion that the plaintiff is not justified in the claim which he has made in the plaint, and that the demurrer to it ought to be allowed.

O'BRIEN, J., concurred with HAYES, J.

CHRISTIAN, J.

The difference of opinion in the Court below in this case proceeded upon a ground which raises very pointedly, for the consideration of this Court, the most important question which could arise in administering this new statute, namely, what are the proper place and office which, while it is left in force, it has a right to occupy in the law of landlord and tenant in Ireland?

The difference between the learned Barons arose from their having viewed that question from precisely opposite points. It might safely be said that each would be right if you would only place yourself on his particular standing point. It obviously did not occur to the Chief Baron to regard this Act as anything but an ordinary one, subject to all the ordinary rules of construction. He took his stand therefore on the anterior law; he cast on those who asserted that that law was altered in the case before him the burden of showing that it was so consistently with established rules of construction; and finding that one of the best settled of those rules was the one stated by *Lord Coke* in *2nd Inst.*—"Nova constitutio futuris formam imponere debet, non prateritis,"—he applied that rule; and doing so he showed, with unanswerable force of reasoning, that there was not, either

in the twelfth or the third sections of the statute, any such clear legislation as that rule requires, before a Court could be warranted in holding that, not in procedure or in remedy merely, but in *right and obligation*, the condition of parties to existing contracts was retrospectively metamorphosed.

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The other Members of the Court, however, took ground in an entirely opposite direction. This is no common Act, to be dealt with on commonplace principles. As one of the learned Barons observed, "It is a statement of the law by which ever thereafter "that abstract thing, the relation of landlord and tenant, shall "be understood." . . . "The third section in particular (the "same learned Baron says) seems designed as a new basis, not only "of this statute, but of the whole law of landlord and tenant." And the pith of the judgment is to be found in this sentence:—"I am of opinion that, *except when otherwise expressly provided*, "the Act, and in particular the third section, *does* apply to agreements made prior to its passing." That is to say, the old rule of construction relied on by the Chief Baron, and which it must be admitted does still apply to common statutes, is, as to this Act, reversed; the presumption not against but in favour of retrospection; and that presumption can only be rebutted, in any particular case, by showing some *express* provision to the contrary in the Act. Another of the Barons takes still higher ground. He observes:—"The object of the Act apparently was to codify the laws governing "this important relation—to place within the limits of one Act all "the provisions affecting it which were scattered throughout the "Irish and Imperial Statute Books, and to place them in a small "compass, within the reach of every member of the community, "under such improvements as, in their opinion, experience had "suggested. Are we to suppose that the Legislature intended that "the existing generation of landlords and tenants were to be "excluded from the enjoyment of the benefits thus intended to "be conferred; and that as to them the Act was never to have "any operation; but as to them the repealed enactments were to "be still in force; and that they were to grope through the "statute books for the provisions regulating their rights and lia-

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"bilities? I think such a construction would defeat the object
 "which the Legislature had declared having had in view, viz., con-
 "solidating and amending the laws relating to landlord and tenant;
 "and instead of that would create two distinct states of the law—
 "one affecting contracts previous, and the other affecting contracts
 "subsequent to the passing of the Act." And both the learned
 Barons dwell at length upon the inconvenience, as if it were
 something altogether novel and unusual, of having two separate
 and distinct codes (as they call them) in operationn at one and
 the same time, for an indefinite period—one for past transactions,
 the other for future.

This is not the first case in which pretensions so exalted
 have been advanced, and successfully advanced, on behalf of this
 statute. Some few years ago there was a case in the Court of
 Common Pleas, of *Bayley v. The Marquis of Conyngham*. It
 was not referred to in the argument; and it is not I believe
 reported; but it bears very closely upon the case before us. It
 was an action by the plaintiff for disturbance of a right of shooting
 and fishing on the land of the defendant. The issue was, whether
 the defendant demised to the plaintiff the shooting and fishing.
 The evidence was, that the defendant's agent agreed by word of
 mouth, without writing, to let the shooting and fishing to the
 plaintiff for one year. The sole question was, as to the validity
 in law of that letting. The difficulties in the plaintiff's way were
 these:—considered as an actual demise, the letting was void at
 Common Law for want of a deed, the subject being an incor-
 poreal hereditament. Considered as an agreement to demise, it
 was void for want of a writing, under the second section of the
 Irish Statute of Frauds. The fourth section of the present Land-
 lord and Tenant Act, which requires leases to be by deed or in
 writing, does not apply to lettings from year to year, or any
 lesser period; but the second section of the Statute of Frauds
 did apply to them, and is expressly left unrepealed by the pre-
 sent statute. The 104th section of this Act provides that the
 several Acts and parts of Acts set forth in the schedule shall,
 to the extent to which such Acts or parts of Acts are by such

schedule expressed to be repealed, *and not further or otherwise*, be and are hereby repealed. The schedule includes the Statute of Frauds (7 W. 3, c. 12, sec. 1). Therefore the statute expressly repealed section 1, and equally expressly declared that all the rest, including section 2, should remain unrepealed. Well, this put the Counsel for the plaintiff in *Bayley v. The Marquis of Conyngham* rather in a difficulty; but he was equal to the occasion. He took up this Landlord and Tenant Act 1860, and boldly insisted that it swept all other law, common or statute, from the ground. It was a great code, which must be taken as embracing all landlord and tenant law within its own four corners, supplanting and putting to silence all that lay outside it; and under its third section (the fourth not applying to a lease for a year) this demise by words of an incorporeal hereditament was valid, though the Common Law required a deed; and the second section of the Statute of Frauds required at least a writing. Well, three Judges of the Court decided in favour of the Counsel who made that argument. They did not, I need hardly say, adopt the trenchant and uncompromising language of Counsel; but they did *hold* that, by the operation of the third section of this statute, both the Common Law and the second section of the Statute of Frauds were displaced, and that the demise, by words, of an incorporeal hereditament was a good demise. The way in which the second section of the Statute of Frauds, which stood right in the path of the decision, was disposed of was this—it was said that it was *impliedly repealed*. Impliedly repealed! Now, considering that the 104th section and the schedule, taken together, had expressly declared, in the strongest negative language, that *nothing* but the first section *should* be repealed, it is plain that this implied repeal of the second section must have been meant in some other sense than the one in which it would be used in the case of an ordinary statute; for of course you cannot say that, in the common sense, one statute can *impliedly* repeal another, when the former says *expressly* that the latter shall *not* be repealed. The only way in which I was able then, or I confess have ever been able since, to comprehend that decision is, by supposing that the Court adopted

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the argument of Counsel, and considered that such was the codifying potency of this statute that it superseded, supplanted, silenced all other existing law, even that contained in statutes which it itself expressly preserved in force.

I have felt it necessary to call attention to that decision, because it was not cited at the Bar, and because, complying with the views of the majority in the Exchequer, in the present case it becomes at once apparent how imperatively desirable it is that some clear understanding should, once for all, be arrived at on this subject.

We are now in the Court of Exchequer Chamber; and I hope the case will not be parted with without some expression of opinion from those who can speak with authority, upon this, the very point on which the Judges differed in the Court below. I can do no more than submit the opinion of one very humble individual. I must say then that I am unable to view this Act in the light in which it was viewed by the majority of the Exchequer, as, in *Bayley v. The Marquis of Conyngham*, I was unable to view it as it was viewed by the majority of the Court. I can see in it nothing but a statute passed for two not very novel or unusual purposes—one to consolidate (*i. e.*, to gather into one Act) several existing statutes; the other, amendment—*i. e.*, to make some partial improvements or changes, here or there, in the existing Common or Statute Law. As to the notion of its being a *code*, which means a constitution embracing within itself the whole of the department of law with which it deals, and supplanting or silencing all other law on that subject, that I believe to be wholly without foundation; and if not in the plan, so neither, I confess, in the execution do I find anything to entitle this statute to exemption from the ordinary rules of construction. It is not I think remarkable for skill in composition, for acquaintance with its subject, or for circumspection or foresight in anticipating and providing against questions—I will not say possible, but probable—and, like the present, even certain to arise.

In no light therefore, whether as regards its plan, its composition, or its history, can I regard this statute as having any claim to the high pretensions which have been advanced on its behalf.

Neither I confess can I appreciate the force of what was so much dwelt on in the Court below, the having two distinct states of the law—one affecting contracts previous, and the other affecting contracts subsequent to the passing of the Act. Surely that is but the ordinary consequence of the introduction of new measures. The same thing occurs in the great Criminal Consolidation Statutes of 1861, which really do possess some resemblance to a code. There, not 39 statutes, on which stress was laid in this case, but 106, were repealed, and a new body of law prescribed for all offences committed after the 1st of November 1861; but the old statutes were kept in force, and are still in force, as to all offences committed before that day.

The clause in the 104th section of this Act, which provides for the keeping in force the old statutes to support existing contracts, and to support proceedings theretofore commenced, was much criticised, as if the latter were inconsistent with the idea of the statute not being generally retrospective. Those expressions, however, have ample subject-matter in the clauses of the Act which are expressly made retrospective.

The rule of construction by which this Act should be interpreted is, in my opinion, the reverse of that laid down in the Court of Exchequer. I am of opinion that, except when otherwise provided, either expressly or by implication, the Act, and in particular the third section, does *not* apply to agreements made prior to its passing.

Having once got the point of view from which the Act is to be regarded, I have said almost all that is necessary for me to say. The case having been treated from that point of view, in one of those exhaustive and masterly judgments of the Lord Chief Baron, which constitute the value of the *Irish Reports* of the present day, I am absolved from the necessity of going into the details of the argument. If he be right in holding that, upon this, as upon other Acts, the presumption is against retrospection, his conclusion is inevitable; as, on the other hand, if Baron Fitzgerald were right in holding that upon this, dif-

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ferently from other Acts, the presumption is in favour of retrospection, *his* conclusion would be equally inevitable.

There is one short view, however, which was not adverted to by the Chief Baron, but which appears to me to be itself sufficient to decide this case against the plaintiff. Assume that, speaking generally, the third and twelfth sections of the statute are retrospective, and do apply to grants in fee-farm, do they apply to the particular fee-farm grant before us? That depends on whether it comes within their language. The twelfth section gives no help to the plaintiff without the aid of the third. That is obvious, and will be found clearly put by Baron Fitzgerald, at pp. 125 and 126 of his judgment. The third section provides that the relation of landlord and tenant "shall be deemed to "subsist in all cases in which there shall be an agreement by "one party to *hold land from or under* another, in consideration "of any rent." Is there, in this fee-farm grant of the 31st of March 1836, an agreement by John M'Carthy to *hold these lands from or under* Pierce Chute? If there is not, then, *ex vi termini*, the Act does not apply. Well, if there be such an agreement, it must be either express or implied. Express agreement to that effect there is none. I remember having some years ago, when at the Bar, seen a lease, which was really an assignment, executed about the time of the decision in *Pluck v. Digges*, which contained a covenant by the lessee to the effect that, notwithstanding the want of a reversion, the relation of landlord and tenant should for all purposes of remedy be deemed to subsist between the parties, and that the grantee would not, in case of ejectment or distress, set up as a defence the want of a reversion. Now I apprehend that, before the late statute, that clause would not prevent the tenant from defeating an ejectment for non-payment under the statute, or a general avowry in an action of replevin; but that its effect would be, either that the grantor would have his action for breach of the covenant, or that a Court of Equity would restrain the grantee from setting up that defence. But, as soon as the late Act was passed, I apprehend that, if the third section be retrospective, that case would fall under it by reason of

the express agreement, the relation of landlord and tenant would be thenceforth deemed to exist, and the grantor could, without assistance from a Court of Equity, maintain his ejectment on his general avowry. But there is no such express agreement in this fee-farm grant. Is there then any implied agreement to that effect? Well, in construing a legal instrument you must construe it with reference to the law as it was at the time it was executed. Did this fee-farm grant contain an implied agreement on the 31st of March 1826, and thenceforth to 1860, when the new Act was passed, by M'Carthy to *hold from or under* Chute? Now you cannot raise by implication an agreement contrary to what is the legal effect of the language of the instrument. But the legal effect of the language was to make M'Carthy hold, not from or under Chute, but from or under whoever Chute held under. So said the statute of *Quia Emptores*. Implication contrary to the legal effect of the language would be wholly inadmissible. The consequence is that, when the new Act was passed, there was not in this fee-farm grant any agreement, either express or implied, that the one party should hold from or under the other; and therefore this case is excluded by the very terms of the Act itself. It was said in argument that this would prevent the third section of the Act applying even to fee-farm grants made after it passed, inasmuch as the statute of *Quia Emptores* is not repealed. Well, I confess, if that consequence did follow, I should not be much appalled by it. But it *does* not I think necessarily follow. For I think it might fairly be argued that an instrument executed after this statute had been passed, ought to be construed with reference to the new law founded by the statute; and that if worded as this deed is, like an ordinary lease, it should be held to embody an agreement that the new statutable relation of landlord and tenant should exist,—a relation discharged of the element of tenure and reversion, and resting exclusively in contract.

On this ground, in addition to those which will be found in the Chief Baron's judgments in this case, and in *M'Areavy v. Hannan*, I concur in thinking that the judgment of the Court of Exchequer should be reversed.

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I concur in the views entertained by my Brethren. It appears to me that the weight of argument is against our giving a retrospective operation to the Landlord and Tenant Law Amendment Act; also, against the supposition that the Legislature intended to make it so—more particularly as we find that in some instances where the Legislature did intend to make the Act retrospective, it has done so in express terms, as in the 10th and 18th sections. Some of the views taken of the statute, and pressed upon us in the course of the argument, would upset the foundations of the laws of real property, and no new foundation was suggested. This Court should be slow *quieta movere*.

Error allowed.—Decision of the Court of Exchequer reversed.

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E. T., May 11.

DEMURRER.—The summons and plaint stated that the defendants held all the waste-lands, mud-banks, or slobbs of the lough called Lough-Foyle, on the south side of the said lough, from opposite

The plaintiffs demised by indenture a large tract of waste-land to D. and R., whose as-

signees the defendant was. Subsequently to the date of the lease it was discovered that the lessees had never got possession of certain portions of the premises professed to be demised, and that those portions were in the possession of third parties, who claimed to be owners thereof in fee. One and a-half year's rent having become in arrear, an ejectment for non-payment of rent was brought, to which the defendant pleaded that, at the time of the making of the lease, certain persons (named in the plea) were, and thence hitherto have been, seised in fee, and in the lawful possession, occupation, and enjoyment of divers, to wit, 100,000 acres, parcel of the demised premises, whereby the lessees or the defendant, or anyone claiming under the demise, did not or could not enter into possession of the said parcel, &c., but were kept excluded therefrom; and although the defendant, and those claiming under the demise, were ready and willing and desirous of entering, &c., yet that from the time of the demise they were kept out of the possession, &c., by the persons aforesaid.

Replication.—That, the lease being by indenture, the defendant was estopped from pleading the defence.

Held, on demurrer, *per* MONAHAN, C. J., and KEOGH, J. (*dissentiente* CHRISTIAN, J.)—That the replication was good.

That the defence was equivalent to a plea of eviction by title paramount; and therefore that the rent was apportionable.

That the case came within the operation of the 44th section of the Landlord and Tenant Act; and therefore that the plaintiffs could recover in the present action the possession of the portion of the demised premises which the defendant actually got possession of.

And that (following the case of *Mercer v. O'Reilly*, 13 Ir. Com. Law Rep. 153), the plaintiffs were entitled to have judgment for the apportioned rent.

Per CHRISTIAN, J.—That the replication was bad; for that, to constitute an estoppel between landlord and tenant, the possession by the tenant of the thing demised is essential.

That the defence was not equivalent to a plea of eviction by title paramount; but that the case came within the authority of *Neale v. M'Kenzie*, and that the rent was suspended.

And that, assuming the case came within the 44th section of the Landlord and Tenant Act, the plaintiffs should have pursued the terms of that section, and claimed only the portion of the demised premises which the defendant actually got possession of.

Neale v. M'Kenzie (2 Cr., M. & R. 84; S. C., 1 M. & W. 742) observed on.

* Before MONAHAN, C. J., KEOGH and CHRISTIAN, JJ.

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Culmore Fort down to the river Roe, and also from the river Roe to Magilligan-Point, so far as the same might be embanked without injury to the navigation of the lake and river of Lough-Foyle; and upon the north side of the Lough-Foyle from Culmore Fort down to Greencastle, such slobes as might not be detrimental to the fisheries; and all and singular other the waste-lands, mud-banks, and slobes (if any) comprised in a certain agreement of the 21st. of May 1838 between the said plaintiff and Thomas Isaac Dimsdale and John Robertson, and thereby agreed to be demised to the said Thomas Isaac Dimsdale and John Robertson; part of which said waste-lands, mud-banks, and slobes have been since reclaimed; together with all houses and buildings thereon, and all ways, watercourses, commons, profits, commodities, advantages, and appurtenances whatever, to the said waste-lands, mud-banks, or slobes belonging or in anywise appertaining, situate in the county of Donegal, and city and county of Londonderry, as tenants to the plaintiffs under a lease, at the yearly rent of £800; and that the sum of £1200, being for one year and a-half of such rent due and ending on the 31st of December 1863, was due to the plaintiffs, &c.

Defence.—That the rent of the said premises, or any part thereof, is not in arrear, because the defendant says that, although the said plaintiffs, by the lease in said plaint mentioned, demised to the lessees therein mentioned, whose assignee the said defendant Timothy Tyrrell now is, all the waste-lands, mud-banks, or slobes of the lough called Lough-Foyle, on the south side of said lough, from opposite Culmore Fort down to the river Roe, and also from the river Roe to Magilligan Point, so far as the same might be embanked without injury to the navigation of the lake and river of Lough-Foyle; and upon the north side of the Lough-Foyle, from Culmore Fort down to Greencastle, such slobes as might not be detrimental to the fisheries, and all and singular other the waste-lands, mud-banks, and slobes, with the appurtenances, as in the said plaint mentioned,—yet that, before and at the time of the making of the said lease, the wardens and commonalty of the Mystery of Fishmongers of the City of London, and the wardens

and commonalty of the Mystery of the Grocers of the City of London, and divers other persons, to wit, one Thomas Scott, David Kirkpatrick, Samuel Elder, James Galbraith, and others, were, and each of them was, and from thence hitherto have and has been, and still are and is, seised in their and his demesne as of fee, and in the lawful possession, use, occupation, seisin, and enjoyment of divers, to wit, 100,000 acres, parcel of the said demised premises in the plaint mentioned, *included in the said lease, and over and above and exclusive of all tenths mentioned and provided for in or by the Lough-Foyle and Lough-Swilly Reclamation Acts, or any of them; and over and above and exclusive of all portions of the said demised waste-lands, mud-banks, or slobes, granted, or agreed to be granted, by way of compensation or otherwise, to any persons or person other than the said lessees;* whereby the said lessees, or any of them, or the said defendant, or any other person claiming under or by reason of the said demise, or through or under the plaintiffs, or the said lessees, did not and could not enter into the possession of, or hold or enjoy the said last-mentioned parcel of the said demised premises, *of which the said last-mentioned persons were so seised and possessed,* or any part thereof, but from the same have, and each of them hath been, kept wholly excluded, from the time of the said demise, through the default of the plaintiffs in that behalf; and although the defendant, and all those claiming under the said demise, have always been ready, and willing and desirous of entering into the possession and occupation and enjoyment of the said last-mentioned parcel of the said demised premises, whereof the plaintiffs had notice, yet, from the time of making the said demise hitherto, the defendant, and all other persons claiming under the said demise, or through or under said plaintiffs or lessees, have and has been, and still are and is, kept out of the possession, occupation, seisin, and enjoyment of the said last-mentioned parcel of the said demised premises, and of every part thereof, and of all rent and profit from the same, by the said persons hereinbefore mentioned; whereby the defendant, and all other persons claiming under the said demise

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as aforesaid, have and has been wholly hindered and prevented from entering into, and holding or enjoying the same, and from having or receiving any benefit, profit, or advantage whatsoever, which might, and otherwise would, have arisen therefrom.

Replication.—That the said defendants ought not to be admitted to plead the said defence, because the plaintiffs say that the lease in the summons and plaint mentioned, under which the defendants hold the said lands as tenants to the plaintiffs, is a lease by indenture bearing date the 7th day of June 1845, and still subsisting; *and which lease was sealed by the lessors, and sealed and signed by the lessees therein mentioned*; whereby the plaintiffs demised the said lands and premises to the lessees therein mentioned, and whose assignee the said Timothy Tyrrell was at the time of pleading his said defence; and this the plaintiffs are ready to verify; wherefore they pray judgment if the said Timothy Tyrrell ought to be admitted against the said deed, to which he is privy as aforesaid, to plead the said defence.*

Demurrer thereto.

The following points were noted for argument:—

1. That the lease relied on in the replication does not constitute an estoppel by reason of anything contained therein.

* The portions of the pleadings printed in italics were added, at the suggestion of the Court, after the first argument. The amendments in the defence were made in consequence of the provisions of the Act of Parliament under which the reclamation of the waste-lands in Lough-Foyle was made. It has not been considered necessary to set out the lease in the report; for although a good deal of the argument was directed to its construction,—viz., whether it was an absolute and unqualified demise of the whole waste-lands within the limits mentioned (except certain specified exceptions), or a demise of whatever interest the Irish Society had in them—the case was decided on the assumption that the portions of the slob mentioned in the plea as being, at the time of the making of the lease, in the possession of third parties claiming to be owners in fee, were included in the demise. The lease was in substance as follows:—It was dated the 7th of June 1845, and was made between the Society of the Governor and Assistants, London, of the new Plantation in Ulster, within the realm of Ireland (commonly called the Irish Society), of the one part, and Thomas Isaac Dimsdale and John Robertson of the other part. It recited an agreement for a lease dated the 21st of May 1838; it then recited an Act of Parliament (1 & 2 Vic., c. —) passed for the reclamation of certain waste-lands and slob in Lough-Foyle and Lough-Swilly, whereby certain persons therein named, of whom the lessees were two, and who were appointed undertakers for carrying out the purposes of the Act so

2. That it is not averred in the replication that the said lease contains any averment of the seisin or title of the plaintiffs.
3. That the said lease does not contain any such averment.
4. That the said estoppel is not certain to every intent.
5. That it is admitted by the defence that an interest did pass by virtue of the lease.
6. That such interest did in fact pass by virtue of the said lease.
7. That the said lease is void as to that portion of the premises of which the lessees did not obtain possession.

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Dowse and J. P. Hamilton, in support of the demurrer.

Brewster, Brooke, M'Causland, Byrne, and J. C. Major, in support of the pleadings.

far as related to Lough-Foyle, were empowered to embank from the sea, drain and improve the waste-lands, sand-banks or slobes on the south side of Lough-Foyle, within certain limits. The Act then appointed certain other persons to be a Board of Commissioners for the purposes mentioned therein. It was then enacted, that a proportion equal to one-tenth of the waste lands, which was adjacent to and lay opposite the frontage of certain townlands mentioned therein should, when embanked and drained, be vested in the owners of the said townlands respectively, for the term of 300 years. The Act then empowered the Board of Commissioners to inquire into claims for compensation by persons claiming any estate, royalty, interest, right, or easement in or upon the said waste-lands, or for any loss or damage occasioned by the execution of the powers of the Act; and to determine and declare what part, share or proportion of the said waste-lands, when embanked and drained, or what sum of money, would be proper and reasonable to be awarded to such persons as compensation for such estate, &c., or for such loss or damage as aforesaid. There was then a provision, that in case the embankment and drainage of the said waste-lands should not be commenced within two years after the passing of the Act, or in case the sum of £20,000 should not be expended before the 31st of December 1841, the powers given by the Act should cease. The lease then recited the Amending Act (6 & 7 Vic., c. —); and that the sum of £20,000 had been expended. Then, by the operative part, all the waste-lands, mud-banks or slobes of Lough-Foyle on the south side of the lough from opposite Culmore Fort down to the river Roe, and also from the river Roe to Magilligan Point, and all other the waste lands and slobes (if any) comprised in the recited agreement of the 21st of May 1838, were demised to the lessees for 100 years from the 1st of January 1837, at the following rents—viz., £300 a-year for seven years from the 1st of January 1844; £800 a-year for the next thirty-six years; and £1000 a-year for the residue of the term. The lease then contained certain covenants, and amongst them a covenant by the lessors, at the expiration of the term thereby granted, and upon payment of a year's rent by way of fine, to grant a new lease for a term of 100 years at a rent of £1500 a-year; and that there should be contained in such new lease a covenant by the Irish Society, upon the payment of one year's rent by way of fine, to grant a new lease for a further term of 100 years, at a rent of £2000 a-year.

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Cited *Co. Litt.*, 43 b, s. 58; *Cole on Ejectment*, pp., 213-215; *Cuthbertson v. Irving* (a); *Right d. Jeffreys v. Bucknell* (b); *Doe d. Strode v. Seaton* (c); *Stroughill v. Buck* (d); *Hayne v. Maltby* (e); *Co. Litt.* 352 b; *Noke v. Auder* (f); *Taylor on Evidence*, p. 103, s. 83; *Skidworth v. Green* (g); *Neale v. M'Kenzie* (h).

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Cited *Co. Litt.*, p. 47 b; *Bayley v. Bradley* (i); *Trevivan v. Lawrence* (k); *Palmer v. Ekins* (l); *Kemp v. Goodall* (m); *Taylor v. Leathem* (n); *Parker v. Manning* (o); *Walton v. Waterhouse* (p); *Duke v. Ashby* (q); *Stephenson v. Lambert* (r); *James v. Laudor* (s); *Warburton v. Ivie* (t); *M'Laughlin v. Craig* (u); *Johnston v. Grant* (v).

Dowse, in reply,

Cited *Co. Litt.*, 229 a.; 3 *Chitty's Pr. Pl.*, 5th ed., p. 1144; *Bacon's Abr.*, O, p. 854; *Roberts v. Snell* (w); *Taylor v. Needham* (x); *Mercer v. O'Reilly* (y); *Upton v. Townsend* (z).

The Court having suggested certain amendments in the pleadings, and, amongst them, either that the defendant should amend his defence by introducing a distinct averment that the lands out

(a) 4 H. & N. 472.

(b) 2 B. & Ad. 278.

(c) 2 Cr. M. & R. 728.

(d) 14 Q. B. 781.

(e) 3 T. R. 438.

(f) Cr. Eliz. 373.

(g) 8 Mod. 311.

(h) 2 Cr. M. & R. 84; S. C. on appeal, 1 M. & W. 747.

(i) 5 C. B. 396.

(k) 2 Lord Ray. 1048.

(l) 2 Lord Ray. 1550.

(m) 2 Lord Ray. 1154.

(n) 2 Taunt. 278.

(o) 7 T. R. 537.

(p) 2 Wms. Saunders, 417 a, n. 1.

(q) 7 H. & N. 600.

(r) 2 East. 575.

(s) Cr. Eliz. 36.

(t) 1 Jones, 313.

(u) 8 Ir. Jur. 328.

(v) Sir T. Ray. 252.

(w) 1 M. & Gr. 577.

(x) 2 Taunt. 278.

(y) 13 Ir. Com. Law Rep. 153.

(z) 17 C. B. 30.

of which he alleged he had been evicted were exclusive of the 200 acres mentioned in the lease, and of the one-tenths and compensation lands; or, that the plaintiff should by replication identify the last-mentioned lands with those out of which the eviction took place; and also, that the plaintiff should amend his replication by introducing an averment that the indenture of lease had been executed by both parties; and the amendments having been made—

On this day the case came on for re-argument on the amended pleadings.

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The replication is bad, on two grounds; first, because the lessees would not have been estopped from pleading this defence; and secondly, admitting that they would, the estoppel does not run against the defendant, their assignee.

On the first point—this is not a base plea of *nil habuit in tenementis*, but that plea along with an averment that the plaintiff never got into possession of a portion of the demised premises. It is admitted that if a tenant go into possession of lands under an indenture of lease, he cannot, so long as he remains in the possession and enjoyment of the demised lands, plead *nil habuit in tenementis*. But the possession and enjoyment of the lands professed to be demised is essential to constitute the estoppel. In *Co. Litt.*, 43 b., s. 58, in the text of *Littleton*, it is said:—
“Tenant for terme of yeares is where a man letteth lands or tenements to another for terme of certaine yeares, after the number of yeares that is accorded between the lessor and the lessee. *And when the lessee entereth by force of the lease*, then is he tenant for terme of yeares; and if the lessor in such case reserve to him a yearely rent upon such lease, he may chuse for to distraine for the rent in the tenements letten, or else he may have an action of debt for the arrerages against the lessee. But in such case it behoveth, that the lessor be seised in the same tenements at the time of his lease; for it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease he made by deed

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"indented, in which case such plea lieth not for the lessee to "plead." It is to be observed that this passage, which has been cited by every Text-writer since the time of *Littleton*, as an authority for the general rule that a tenant shall not be allowed to deny his landlord's title, is prefaced by the words, "and when the lessee entereth by force of the lease," which qualify the whole section.

In *Cuthbertson v. Irving* (a), at page 757, Martin, B., observing on Sergeant *Williams's note* to *Walton v. Waterhouse* (b), says:—"We adopt this *note* as the right statement of the law; and in that "the following propositions may be laid down:—First, if any estate "or interest passes from the lessor, or the real title is shown upon "the face of the lease, there is no estoppel at all. Secondly, if the "lessor have no title, and the lessee be evicted by him who has title "paramount, the lessee can plead this, and establish a defence to "any action brought against him: *Doe d. Higginbotham v. Barton* (c); but, thirdly, so long as the lessee *continues in possession "under the lease*, the law will not permit him to set up any defence "founded upon the fact that the lessor '*nil habuit in tenementis*.'"

Again, Tyrrell is the assignee of the lessees Dimsdale and Robinson, and therefore cannot be estopped by a deed he never executed. It is admitted that he would be estopped if the lessees had got into possession; for estoppels run with the land. But here, the lessees never got the possession of the portions of the slob-lands mentioned in the defence: *Stronghill v. Buck* (d); *Hayne v. Maltby* (e); *Co. Litt.*, 352 b. On the question of estoppel he also cited *Right d. Jeffreys v. Bucknell* (f); *Doe d. Strobe v. Seaton* (g); *Noke v. Auder* (h); *Furlong's Landlord and Tenant*, p. 439; *Stevenson v. Lambard* (i).

If the defendant then be not estopped from pleading this defence, the next question is, whether it is a good answer to the summons

(a) 4 H. & N. 742.

(b) 2 Saund. 418 a.

(c) 11 Ad. & Ell. 307.

(d) 14 Q. B. 781.

(e) 3 T. R. 438.

(f) 2 B. & Ad. 278.

(g) 2 Cr., M. & R. 728.

(h) Cro. Eliz. 373.

(i) 2 East, 775.

and plaint? and it is submitted it is; whether the result of the facts stated in it be that the rent is suspended or apportionable—in other words, whether the facts amount to an eviction by title paramount, or not. If the rent be suspended, the plea is good, no rent being due; and, if it is apportionable, it is equally good; for to support an ejectment under the Ejectment Statutes, there must be a rent certain. In *Lessee Swift v. Allanson* (a) the action was an ejectment for non-payment of rent; and the rent being a lump rent, and there having been an eviction of the tenant from part of the lands by title paramount, the question was, whether the action would lie? and Brady, C. B., says:—"How could the tenant lodge money in Court, or how could he know how much to lodge? or how could the landlord, in case of judgment by default, swear to any specific, or conscientiously swear to any precise sum as due? or, if a landlord claimed too much, how could the Court set it right? This showed that the Legislature never intended that the statutes should apply to such a case." In *Bacon's Abridgment (Rent)*, M, 3, the mode of apportioning the rent is given:—"This may be done upon a plea of *nil debet* pleaded by the tenant, because when issue is joined on such a plea, it is the business of the jury to determine whether anything, and how much, is due; and this is done with regard to the real value of the land remaining in his hands, and not with regard to the quantity of it." But, whatever be the proper method of ascertaining the rent, it is clear that it cannot be done in an action of ejectment; and the course which the plaintiffs should have adopted was, first, to ascertain the rent, and then to bring an ejectment for non-payment of the rent so ascertained: *Daniel v. Grace* (b). If the rent be apportionable, it lies on the plaintiffs to plead the facts raising the apportionment: *Roberts v. Snell* (c).

But it is submitted that this is not a case of apportionment at all; that the facts pleaded are not equivalent to an eviction by title paramount, and that the case is governed by *Neale v. M'Kenzie* (d).

(a) Batty, 326, n.

(b) 6 Q. B. 145.

(c) 1 M. & Gr. 577.

(d) 2 Cr., M. & R. 84; S. C., on appeal, 1 M. & W. 747.

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In that case the action was for trespass *quare clausum fregit*; and the defendant pleaded, in substance, that the trespass was committed in making a distress for a half-year's rent then due. The plaintiff replied, admitting that he had accepted the lease, and entered under it; but stating that, at the time of the demise, one Adam Charlton was in possession of eight acres, part of the demised premises, under a prior lease from the defendant, which continued and was in force until after the time when the half-year's rent was due; and that during the whole of that time he was kept out of the possession of that part by Adam Charlton—(precisely the facts of the present case). To that replication the defendant rejoined that the plaintiff had notice of Charlton's lease at the time of his entry upon the demised premises. To that rejoinder a demurrer was taken; but the real question was, whether the replication was a good answer to the defence? The case, in the first instance, came before the Court of Exchequer. That Court held, first, that the lessee had an *interesse termini* in the eight acres demised to Charlton; secondly, that the facts stated in the replication were equivalent to an eviction by title paramount, and, consequently, that the rent was apportionable; and, thirdly, that you could distrain for an apportioned rent. The case afterwards went on appeal to the Exchequer Chamber, where the decision of the Court of Exchequer was reversed; and the report will be found in 1 *M. & W.*, p. 747. The judgment of the Court was delivered by Lord Denman, C. J. It was held, in the first place, that an *interesse termini* in the eight acres did not pass to the plaintiff, but that the lease was wholly void *quoad* that portion; and, secondly, that the facts of the case did not constitute an eviction by title paramount; and Lord Denman, at page 758, says:—"But we are of opinion that "the impediment to the plaintiff's taking possession in this case "is not analogous to an eviction; for it appears to us that no "interest in the eight acres previously demised to Adam Charlton "passed to the plaintiff by the demise subsequently made to him. "The demise to Adam Charlton covered the whole time during "which the rent distrained for accrued." Then, after showing that no rent in respect of the eight acres had ever come into existence,

he says (at page 763):—"And we are not aware of any case where "an entire rent reserved has been held to be apportionable in which "the tenant has not been at some period subject to the entire rent, "by virtue of the demise. Here, the right of apportionment is not "founded upon any eviction or other matter occurring subsequently "to the demise, but upon an original defect in the demise itself, by "which the entire rent was reserved." The Court therefore held that, as the rent was not apportionable, the distress was not justifiable; and the replication was a good answer to the plea. In *Williams v. Hayward* (a), in the argument of *Jones*, for the defendant, Lord Campbell, C. J., says:—"Eviction is some positive act, and not a mere non-feasance;" and to the Counsel for the plaintiff, who was proceeding to reply, he says:—"You need have no trouble "about the eviction: *Upton v. Townsend* is not applicable: in that "case the lessee was deprived of that which was leased. The decision does not trench on what I have always understood, viz., that, "to constitute eviction, the lessee must be deprived of part of the "corporeal hereditaments demised." And in *Neale v. McKenzie* (b), in the argument of *Cleasby*, Parke, B., at page 95, says:—"Here, "the plaintiff never entered into the eight acres of land; and can "there be an eviction from that of which the party never was in "possession?" On the same point he cited *Mercer v. O'Reilly* (c).

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First; as to the replication, the lessees would have been estopped by the acceptance of the lease of 1847 from pleading this defence. In a note of Sergeant *Manning* to the case of *Doe d. Bullen v. Mills* (d), the learned annotator cites the following passage from the argument of *Plowden*, in *Smith v. Stapleton* (e):—"In a lease by indenture, both parties are concluded to say the contrary but that "the lessor had the land in possession to pass, and that it passed "in possession, according to the tenor of the lease." And, commenting on the case, he says:—"If the lease to *Williams* had been

(a) 5 Jur., N. S. 1419.

(b) 2 Cr., M. & R. 84.

(c) 13 Ir. Com. Law Rep. 153.

(d) 4 N. & M. 25; S. C., 2 Ad. & Ell. 17. (e) Plow. 434 a.

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"by deed-poll or by parol, or if the lease, though by indenture, had expired before the bringing of this ejectment, it might have been doubted *whether the acceptance of the lease* would have been more conclusive against the lessee than an attornment and payment of rent, which, if made to a party from whom the possession had not been *originally* derived, would create no estoppel." He then cites several authorities to show that it is the acceptance of the lease that works the estoppel.

In *Furlong's Landlord and Tenant*, p. 439, it is said:—"If a man *accept* a lease of his own lands, of which he is himself in the actual seisin and possession, he is estopped during the term from saying the lessor had nothing in the lands at the time of granting the lease; for by *acceptance* of the indenture he is, for the time, as perfect a lessee for years as if the lessor had been seised of the lands in fee at the time of making the demise; and both parties are concluded by the indenture from denying, either that the lessor had the land in possession to pass, or that it passed in possession, according to the tenor of the lease." And for that he cites *Smith v. Stapleton*. This is a plea of *nil habuit in tenementis*; and, whether that plea be pleaded generally or specifically, it is bad.

In *Palmer v. Ehins* (a), where the action was an ejectment for non-payment of rent, it was held that a plea similar to the present was tantamount to a plea of *nil habuit in tenementis*, and no answer to the action. In the note to *Walton v. Waterhouse* (b) it is said that, where an interest passes, the tenant may show that the lease has determined; but, where no interest passes, the rule laid down in *Littleton*, s. 58, is law.

Right d. Jeffreys v. Bucknell (c) is no authority in this case. That was the case of a release, which works no estoppel, because it passes nothing but what the releasor has at the time. No doubt the word "grant" occurs in the operative words; but the instrument was a release. Lord Tenterden, C. J., in giving judgment, cites the following passage from *Littleton*:—"No right

(a) 2 Lord Ray. 1550.

(b) 1 Wms. Saund. 417.

(c) 2 B. & Ad. 278.

"passes by the release but the right which the releasor hath
 "at the time of the release made. For, if there be a father
 "and son, and the father be disseised, and the son (living his
 "father) releaseth by deed to the disseisor all the right which
 "he hath or may have in the same tenements, without clause
 "of warranty, &c.; and after the father dieth, &c., the son may
 "lawfully enter on the possession of the disseisor."

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Neale v. M'Kenzie is distinguishable from the present case. In that case the second lease was by parol, but here it was by indenture. That distinction is taken by Lord Denman, C. J., at p. 763, in observing on a case in *Moore's Reports* (p. 50), where lands at common law and copyhold lands were leased by indenture, rendering rent; it turned out that the lessor had no power to lease the copyhold lands; and it was held that as to this the lease was utterly void; but it was added that if a man lets lands, part of which he is seised of by disseisin, that by the entry of the disseisee the rent shall be apportioned. And Lord Denman says:—
 "In the case before the Court, *which is not the case of a demise by indenture*, the rent is reserved in respect of all the land professed
 "to be demised, and to be issuing out of the whole and every part
 "thereof; and as the plaintiff, as to a portion of the land comprised
 "in the demise (which might be great or small as far as the principle is concerned), has taken no interest, *and is not bound by any estoppel*, we are of opinion that the distress made by the defendant
 "is not justifiable, either in respect to the whole rent reserved or
 "any portion of it."

If the lessees would have been estopped from pleading this defence, their assignee, the defendant, is now equally estopped. In *Trevivan v. Lawrence* (a) one of the points decided was, "that where an estoppel works on the interest in the lands, it runs with the land into whose hands soever the land comes." On the same point he cited *Palmer v. Ekins* (b); *Kempe v. Goodall* (c); *Stephenson v. Lambard* (d); *Johnson v. Grant* (e).

(a) 1 Salk. 276.

(b) 2 Lord Ray. 1550.

(c) 2 Lord Ray. 1154.

(d) 2 East. 575.

(e) 2 Sir Th. Raymond's Rep. 252.

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As to the defence.—It is submitted in the first place that the rent is apportionable; secondly, if it be apportionable, that it can be recovered in the present form of action; and if that be so, the plea is bad. On the first point, whether the facts stated in the defence raise a case of apportionment or suspension; in *M'Loughlin v. Craig* (a) a defence the same in substance as the present was held to amount to a plea of eviction by title paramount. That case is undistinguishable from the present. *Neale v. M'Kenzie* is no authority; in that case the second lease was by parol, here it is by indenture. On the second point, whether the apportioned rent can be recovered in an action of ejectment for non-payment of rent; in *Stephenson v. Lambard* (b) it was held that, in the case of an eviction by title paramount, where the rent is apportionable, the apportioned part may be recovered in an action of covenant. It may also be recovered in replevin: *Johnson v. Grant* (c). And in debt, *M'Loughlin v. Craig* (d). It is submitted that it may be recovered also in an action of ejectment. Since the Common Law Procedure Act, the action of ejectment for non-payment of rent has become an action with a double aspect—viz., an action for the recovery of the possession of the land, and a personal action for the recovery of the rent. It was so treated in *Percival v. Dunne* (e); and in *Murphy v. Carey* (f) the Court refused on motion to set aside a defence, founded on that view of the statute, and put the plaintiff to his demurrer.

But the 44th section of the recent Landlord and Tenant Act (23 & 24 Vic., c. 154) removes any difficulty which might have stood in the plaintiff's way before the passing of that Act. That section enacts, that "The surrender to, or resumption by a landlord, "or *eviction* of any portion of the premises demised by a lease, shall "not in any manner prejudice or affect the rights of the landlord, "whether by action, or entry, or ejectment, as to the residue of the "premises." In *M'Loughlin v. Craig*, where the facts were sub-

(a) 7 Ir. Com. Law Rep. 117; S. C. 1 Ir. Jur. N. S. 328.

(b) 2 East. 575.

(c) 2 Sir Th. Ray. Rep. 252.

(d) *Ubi supra*.

(e) 9 Ir. Com. Law Rep. 422.

(f) 12 Ir. Com. Law Rep., App. ix.

stantially the same as here, the defence was held to be equivalent to a plea of eviction by title paramount. The 52nd section enables a landlord, whenever a year's rent is in arrear, to bring an action of ejectment for the recovery of the possession of the lands. Here there was a year's rent due under the indenture of lease, with respect to the land of which the defendant got possession. It is submitted that, under the joint operation of these two sections, the plaintiffs are entitled to bring this ejectment, and to recover by it the possession of the portion of the demised lands which the defendant actually got possession of, and also an apportioned part of the rent.

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As to the plaint.—The plaintiff's declare on the demise, for the whole of the lands comprised therein, and for the whole rent. That has been the course of practice established by authority. In *Stephenson v. Lambard* (a) the plaintiff declared for the whole rent, and by his fourth plea the defendant raised a case of apportionment. In *M'Loughlin v. Craig* the same course of practice was followed. And in *Johnston v. Grant* (b), which was an action of replevin, the declaration went for the whole rent, and the defendant set out the facts raising the apportionment. But it has been said that the system of pleading has been altered by the Landlord and Tenant Act; that the 44th section of that statute enables the landlord in the case of an eviction to recover the residue of the land by an action of ejectment; and therefore that it is for him to ascertain the amount of the rent in some other form of action, and then declare only for the residue of the demised premises. But no such preliminary step is required by the statute. That Act leaves the action of ejectment as it was under the Common Law Procedure Act. It is therefore submitted that the plaintiff may still bring his ejectment in the form given in the Common Law Procedure Act, and it is for the defendant, if he have any answer to it, to put it on the record. That is consistent with common sense, for the tenant is the person who best knows what lands he is in possession of. In the present case it would be impossible for the plaintiff to declare for the residue of the premises.

(a) 2 East. 575.

(b) Sir Th. Ray. 252.

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These slob lands are of great extent, and the plaintiff could not possibly ascertain what portions the defendant did not get possession of. In *Roberts v. Snell* (a), which was an action of replevin against the assignee of the reversion of part of the demised premises, the assignee knew what he had got by his deed, and therefore it lay upon him to set out the facts specially.

If the plaint be good, the defence is bad in point of form; for it professes to answer the whole of the plaintiff's claim. The averment is, that the said "rent is not due or in arrear, or any part of it."

It is well settled that if a plea profess to answer the whole cause of action, and be only an answer to part, it is bad on demurrer. In 1 *Williams' Saunders*, p. 286 (n.), it is said:—"If a plea begin "with an answer to the whole defence, but in truth the matter "pleaded is only an answer to part, the whole plea is bad and "the plaintiff may demur." And for that he cites *Putney v. Swan* (b).

Upon the construction of the lease, they cited *Houston v. Barry* (c); *Palmer v. Faussett* (d); *Arundel v. Arundel* (e); *The Attorney-General v. Drummond* (f); *Shepherd's Touchstone by Preston*, p. 87; *Hegarty v. Nally* (g).

Dowse, in reply.

If this were nothing but a plea of *nil habuit in tenementis*, it is admitted it would be bad; but, when that plea is joined to an allegation of facts which show that the defendants never got into possession of the demised premises, it is a good defence. Though *nil habuit in tenementis* by itself may be a bad plea, yet it may be part of a very good plea. In *Taylor v. Zamira* (h), which was an action of replevin, to the avowry of the defendant the plaintiff pleaded a special plea, which it was contended was bad, as amounting to a plea of *nil habuit in tenementis*. And Gibbs, C. J., says:—"None of this Court have the least doubt on the point

(a) 1 M. & Gr. 577.

(c) 5 Ir. Eq. Rep. 294.

(e) 1 M. & K. 316.

(g) 13 Ir. Com. Law Rep. 532.

(b) 2 M. & W. 73.

(d) Sm. & B. 319.

(f) 1 Dr. & W. 353.

(h) 6 Taunt. 524.

"on which the plaintiff's Counsel very properly rested his argument that *nil habuit in tenementis* is in no case an answer to "an avowry for rent, or to an action of covenant for rent; but "he was mistaken in the corollary he wished to raise from that "proposition. In every plea of eviction there is an averment that "the lessor had not a perfect title when he demised; but that fact "alone would not suffice: to constitute a plea, to it must be added "the fact that the lessee was in consequence evicted. The whole "is a defence. The plaintiff's Counsel argues that, because *nil habuit in tenementis* alone is not a defence, therefore it cannot "be a part of any other defence."

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In *Taylor on Evidence*, p. 108, it is said:—"In regard to "estoppels by deed, a party is not prevented from disputing the "correctness of that which is not an essential averment, but is mere "description; such, for instance, as the date of the deed, *the quantity of land*," &c. And for that he cites *Skipworth v. Green* (a), where it was held that, where, in a demise of a close, the close was described as containing five hundred acres, the party was not estopped from showing that it contained less. In *Cuthbertson v. Irving* (b) Martin, B., puts estoppel between landlord and tenant on the true grounds. At page 758 he says:—"This state "of law in reality tends to maintain right and justice; and the "enforcement of the contracts which men enter into with each other " (one of the great objects of all law); for so long as a lessee enjoys "everything which his lease purports to grant, how does it concern "him what the title of the lessor, or the heir or assignee of his "lessor, really is? All that is required of him is that, having "received the full consideration for the contract he has entered into, "he should on his part perform it."

In *Hayne v. Maltby* (c) the estoppel between landlord and tenant was pressed into the case by way of illustration; and on that point Ashurst, J., says:—"This is not like the case of landlord and "tenant; as long as the latter *enjoys* the estate, he shall not be "permitted to deny his landlord's title, for he has a *meritorious*

(a) 8 Mod. 311.

(b) 4 H. & N. 472.

(c) 3 T. R. 438.

H. T. 1865. *Common Pleas.* “*consideration*; but when he is expelled by a person having a “superior title, he may plead it.” These cases put the estoppel between landlord and tenant on the true ground. It is the meritorious consideration arising from the enjoyment of the land that creates the estoppel, and that, independently of the indenture altogether; but, where there is no possession and no enjoyment, there can be no estoppel. He cited on this point *Palmer v. Ekins* (a); *Bacon’s Abridgment, Leases*, O, p. 854, 7th ed.

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But whether the privity of contract arising from the execution of the indenture would estop the lessees from pleading this defence, there can be no estoppel as against the assignee. With respect to the latter, the estoppel is founded on privity of estate, and can only be co-extensive with the estate which passed. No doubt estoppels run with the land; but where nothing passes to the assignees, there is no land for the estoppel to run with. As to the portion of the demised premises which the defendant got possession of, an estoppel may exist; but *quoad* the part he did not get possession of, there is no estoppel.

If then the estoppel be got rid of, the case comes within the authority of *Neale v. M’Kenzie*, and the defence is good. It has been attempted to distinguish that case from the present, on the grounds; first, that in *Neale v. M’Kenzie* the second lease was by parol, while here it was by indenture; and, secondly, that the actions in the two cases were different; but in principle the cases are undistinguishable. There, as here, the defendant relied on an original defect in the lease—a total failure of the grant as to part; which, it was contended by the plaintiff, and so held in the Court below, was equivalent to an eviction by title paramount. That decision was reversed in the Court of Exchequer Chamber; and it was there held that the case did not amount to an eviction by title paramount, and that the rent was suspended.

But assuming that the facts pleaded in the defence amount to an eviction by title paramount, and that the rent is apportionable, the plea is equally good; for it shows that the plaintiffs cannot maintain this action. Under the ejectment statutes, an ejectment

(a) 2 Lord Ray. 1550.

could not be brought for an unascertained rent; so that where lands were leased at a bulk rent, and the tenant was evicted out of part by title paramount, the landlord could not maintain an ejectment; and the reason was, that if the tenant did not take defence, the landlord, before obtaining judgment, was obliged to make an affidavit as to the amount of rent due: *Lessee of Swift v. Allanson* (a). That provision of the ejectment statutes has been re-enacted by the 58th section of the Landlord and Tenant Act. The plaintiffs have mistaken their course; they should, in the first place, have ascertained the rent in some other form of action, and then have brought an ejectment for the apportioned rent; but they cannot bring an ejectment until the rent is ascertained. The 44th section of the Landlord and Tenant Act does not help the plaintiffs; this is neither a case of "surrender," "resumption," or "eviction," but of an original defect in the lease; and is a *casus omissus* in the Act. But even if the case came within the 44th section, the landlord cannot avail himself of it until he has, in the first place, had the rent apportioned in some other form of action; and when he has done so, he may then bring an ejectment.

Again, the plaint is bad on other grounds. By the third section of the Landlord and Tenant Act, the relation of landlord and tenant is to be deemed to be founded on contract. Here the contract is totally mis-stated; the tenancy is not that stated in the plaint at all, but a wholly different one. If the plaint had described the premises as having been demised by the lease, it might not be open to the objection; but here the description is of the present tenancy.

He cited *Doe d. Higginbotham v. Barton* (b); *Wentworth on Pleading*, 5th vol., p. 88; 1 *Lilly on Pleading*, p. 142; *Farquhar v. Kelly* (c); *Walsh v. Trevanion* (d).

Cur. adv. vult.

On this day the Court delivered judgment.

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May 11.

CHRISTIAN, J.

This was an ejectment for non-payment of rent. The tenancy

(a) Batty's Rep. 326.

(b) 11 Ad. & Ell. 307.

(c) 4 Ir. Com. Law Rep. 490.

(d) 15 Q. B. 733.

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was described in the plaint as being of all the waste lands, &c., comprised in a certain agreement of 21st of May 1838, at the yearly rent of £800. And because one year and a-half of that rent was (it was alleged) in arrear, possession was claimed of the whole of the premises so stated to be the subject of the tenancy.

To this the defendant, an assignee of the lessee, pleaded, that the rent, *or any part of it*, was not in arrear; because, he said (in substance) that, as to a certain portion of the premises professed to be demised, the plaintiffs (the lessors) before and at the time of the making the lease, had nothing, and the lessee got nothing, either of title or possession; inasmuch as that portion was the estate in fee-simple of certain other persons, who were then in possession and who kept their possession; that thus, as to a part of the premises out of which the whole rent was professed to be reserved, the lease was from the first without any subject to operate on.

To this plea a replication was filed, which is to this effect—that the lease was a lease by indenture, executed under seal by lessor and lessee, and that the defendant, as assignee of the lessee, should be held to be thereby estopped from averring the facts stated in the plea.

To this replication the defendant demurred.

The first point which must be determined is of course that which is raised by the demurrer; for unless we hold the replication to be bad, none of the other questions which were argued can have any existence.

Is, then, the defendant, as assignee of the lessees, estopped to plead the defence set up in the plea? Before we can determine this, it is obvious that we must first have a clear apprehension of what the facts really are which are averred in the plea; a thing not only essential for the determination of the demurrer, but equally so for the determination of the questions which would arise on the plea itself, in the event of our judgment being adverse to the replication.—[His Lordship here read the defence.]

The purpose with which I have thus dwelt on the language of the plea is this: to fix attention on the fact that there is no averment that any act whatever was done either by the lessees or

their assigns, on the one hand, or by the third persons in possession by title, on the other, after the making of the lease. So far as regards the lessees or their assigns, the averment merely is, that they were "ready and willing and desirous" to enter into possession; but that, from the making of the lease to the pleading of the plea, they were "kept out" by the said persons, and "thereby hindered" from taking possession. As regards the persons having title, the averment merely is that, having been in possession by title before and at the time of the making of the lease, they simply remained so, and their possession "kept out and hindered" that of the lessees. There is no averment that the "desire and willingness" of the lessees was ever manifested by act or even word; and there is none that the resolve of the third parties to hold their right was ever manifested by act or word. The meaning of the defence plainly is no more than this, that the rightful possession of those parties in its nature and of necessity excluded any possession by the lessees. From which there is this result (which it will be important to bear in mind throughout the case), that from the moment the lease was sealed and delivered, to that of the assignment to the defendant, and from thence to the pleading of this plea, it must be taken, in the absence of any averment to the contrary, that no act was done by anyone by which the situation was varied from that in which it was placed by the bare act of making the lease.

The plaintiffs' Counsel, I think, will see that, in bringing the case to this, I place it in the point of view the most favourable for their argument upon the question of estoppel, for I take the case as at the instant after the making of the lease. But I am of opinion that, taking it even so, the defendant is not estopped from presenting to the mind of the Court the facts pleaded, for whatever their legal value may be; and that, consequently, so far as the demurrer to the replication at all events, the defendant is entitled to succeed.

The question was divided in argument into two; first, could the *lessees* have pleaded the defence? second, if not, is the defendant, their *assignee*, in a better position?

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The first of these is, in my opinion, the real question; and I do not hesitate to answer it in the affirmative.

I shall consider the case upon this branch of it as if the premises which belonged to the strangers formed the whole subject of the demise. I take it so, because I did not go along with that portion of the argument of the defendant's Counsel, in which they contended that the estoppel (if otherwise existing) would be satisfied by the passing of an estate in the other part of the demised premises. Here again I take ground the most favourable to the plaintiffs' argument; for of course if the defendant would not be estopped from pleading this defence to the whole, *a fortiori* he would not as to a part.

No decision in point was referred to at either side; but the plaintiffs' Counsel relied on the general rule or maxim that a tenant cannot be heard to dispute his landlord's title, and that as between such parties *nil habuit in tenementis* is a bad, or more correctly, an inadmissible plea.

The maxim thus relied on is one of those about which a certain reverence (so to speak) has gathered in the law; which, whenever it exists, carries with it this danger, that the maxim in question may be sometimes applied in practice to cases not within its original reason. And that would, in my opinion, be precisely the case here, if this maxim were made the means of excluding the present defence.

There is a case of *Gravenor v. Woodhouse* (a) to which I here refer for two purposes; first, for the terms in which the general rule in question is stated (on which I shall refer to other authorities also by-and-bye); secondly, for the line of argument pursued by the Court in dealing with the application of that rule to the case before them. The question in the case was, whether a tenant was estopped by an attornment; which he was held not to be. Parke, J., delivering the judgment of the Court, says:—"Of the general rule of law, that a tenant shall not be allowed to question the title of his landlord, *where he has originally received possession from him* and has paid him rent, there is no doubt ever since the case

(a) 1 Bingham 38.

“of *Sullivan v. Stradling*. It always furnishes a strong *prima facie* case, but to the generality of this rule there are exceptions ; “for although on the one hand the general rule is most wise and “politic, in not allowing a tenant lightly to use to his landlord’s “detriment that title, the possession of which he has intrusted to “him ; so on the other, it is most just so far to guard the tenant, “that he may not be carelessly put into the hazardous situation “of paying his rent twice over, and being put to the trouble and “expense of an action to recover that which he may have been “compelled to pay. The supposed generality of the rule has been “departed from in many cases.” The learned Judge then enumerates several instances in which that had been done, and proceeds :— “A variety of cases might be put in which a tenant would be “excused from payment of rent to a person not really entitled to it, “but I forbear to trouble the Court with any more. The question “then is, whether in this case there is any reason for an exception “to the admitted general rule ?”

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So I say also in the present case, “the question is, whether there is any reason for an exception to the admitted general rule ?” Of the exceptions already established, there is one which comes nearest to the present case, and shows in my judgment very clearly the reason and limit of the rule itself. Vary the present defence by substituting, in place of the averment that the lessees were kept excluded from the possession from the making of the lease, an averment that they entered under it, and that, after they had entered, the persons whose estate it was evicted them from the possession,—and you have an admittedly good plea, free from all estoppel. Here then is an exception, well established, from the general rule. Why is it an exception ? The assertion of *nil habuit in tenementis* is just as direct and complete in that case as in the other. “*Nil*” in the maxim means nothing in *estate*—it does not assert anything as to the *possession*. And down to the moment of the eviction—*i. e.*, while the indenture and the possession co-existed—the estoppel was complete ; but the moment the possession is withdrawn, the estoppel vanishes ; and the lessee may assert, not merely *in verba de presenti* or prospectively, but retro-

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spectively and in the teeth of the lease, that before and at the making of it the lessor had nothing in the premises.

Is there anything then, in reason or in principle, in the absence of direct authority, which obliges us to hold that while the lessee, who has once got the possession, but from whom it is taken by the right owner, can be heard to defend himself, the lessees who never got or could get it at all, has his mouth stopped? To test the proposition, I will put an extreme case: suppose that I induce a person, who is ignorant of Dublin and its neighbourhood, to accept from me a lease of premises therein described, at a rent £1000 a-year, and he executes the lease in reliance on me; he comes over to Dublin to take possession, and there discovers that the subject of the demise is Her Majesty's palace, called the Viceregal-Lodge. He finds he has been hoaxed, and he does nothing. But, when the first gale day arrives, I bring an action against him for £500. Is his mouth stopped? Is he defenceless? Or did the law impose it upon him, in order to let him into his defence, to do anything so absurd as to make an endeavour or demonstration towards taking possession, in order to call into action the resistance of the right owner; the result of which to him, in the case I have put, may be divined.

Having examined, as carefully as I could, the authorities which were cited by Counsel, and such others as I was myself able to discover, I have now to state that the reasonable rule to be extracted from them is, in my opinion, this—*nil habuit in tenementis* simply is a bad plea; but *nil habuit in tenementis*, coupled with negation of possession, is a good plea. When the facts enable you to add to the negation of title the negation of possession, the plea is admissible; and, whether that negation of possession consist in an averment that it was taken away by eviction, or in an averment that it never was, and never could be, obtained at all, is not in my opinion material. In either case I think it repels the estoppel which forbids *nil habuit in tenementis*.

During the recent argument in the case of *Domville v. Ward*,* many passages from cases and text-books were cited to us, and many strong observations made in the reply on behalf of the

(a) *Post*, page 381.

plaintiff, as to the binding nature of estoppels in the abstract, the sanctity of statements made under seal, and the inexorable sternness with which the law imposes silence on those who, having executed a lease by indenture, would question the title which it purports to confer. Now it occurs to me, I confess, that this method of dealing with the question advances it but little in argument. The defendant's Counsel admit it all; but they assert that in all those authorities it was an essential term, either expressed or tacitly assumed, that the lessee was enjoying, or could, if he chose, be enjoying, the land professed to be demised. The whole question is, whether this kind of estoppel, *estoppel by tenancy*, be not something quite apart from mere estoppel by deed; whether its essence be not in the possession, whilst the form of the lease—*i. e.*, whether it be by indenture, deed-poll, or by parol—is a thing subordinate—subordinate but important, in the way I shall presently point out. Mr. *O'Connor Morris*, in his clear and thoroughly lawyer-like argument, touched the root of the matter when he said that this doctrine was the echo, in our day, of the old principles of the feudal tenures. But the very essence of feudal tenure was the seisin of the land. It was the livery of seisin, giving not only the manual possession, but putting the tenant into the freehold, which constituted the tenure. What would a feudal lawyer have said of tenure without land? I confess it occurs to me that the way to investigate the case is not to pick out abstract passages, and read them without reference to the facts to which, expressly or tacitly, they were applied; but to look out for the cases in which the reason of the rule has been touched on. For, if the plaintiff's contention be right, *viz.*, that in case of a lease by indenture, the deed alone constitutes complete estoppel, possession or no possession, we would expect to find that, when such a case was in hand, the only thing adverted to would be the execution of the indenture, and that no stress would be laid on a fact so irrelevant as the presence of the possession. Now, so far is this from being the case, that what I now purpose to do is to show, by a number of instances, taken almost at random, that, whenever the reason of the rule is stated, whether it be a case of indenture or not, it is put exclusively

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on this, that the tenant shall not be allowed to question the title of the person *under whom he is enjoying the thing demised*.

In section 58 of *Littleton*, being the one on which *Coke's Commentary*, at page 47 *b*, so much relied on by the plaintiffs' Counsel, is made, and which forms the foundation on which *Viner, Comyn, Bacon*, and other Text-writers, proceed, one of the essential terms is "this, *when the lessee entereth by force of the lease*." In *Parker v. Manning* (a), a case of lease by indenture, Ashurst, J., says:—"The general rule is, that a tenant cannot be permitted to convert the title of his landlord; and it is founded on good sense; *for, so long as the lessee continues to enjoy the land demised*, it would be unjust that he should be permitted to deny the title under "which *he holds the possession*;" and Lord Kenyon, C. J., expresses himself to the same effect. I have mentioned already the similar terms in which the rule is laid down by Parke, J., in *Gravenor v. Woodhouse* (b). In *Hayne v. Maltby* (c) Lord Kenyon, C. J., says:—"The tenant is not *at all events* estopped to deny the landlord's title; the estoppel *only exists during the continuance of his occupation*." Ashurst, J.:—"As long as the tenant enjoys the *estate* he shall not be permitted to deny the landlord's title, for *he has a meritorious consideration*." Bullen, J.:—"As long as *the tenant holds under the lease* he is estopped from denying "his landlord's title." In *Cuthbertson v. Irving* (d) [also a case of lease by indenture, and one of the most authoritative modern readings on this head of law], Baron Martin, delivering the judgment of the whole Court of Exchequer, afterwards affirmed by the Exchequer Chamber, formally lays down several propositions as the result of the authorities; and the third of them is this (page 758):—"So *long as the lessee continues in possession under the lease*, the law "will not permit him to set up any defence founded upon the fact "that the lessor *nil habuit in tenementis*." . . . "This state of "the law in reality tends to maintain right and justice, and the "enforcement of the contracts which men enter into with each "other (one of the great objects of all law); for, *so long as a lessee*

(a) 7 T. R. 539.

(c) 3 T. R. 438.

(b) 1 Bing. 42.

(d) 4 H. & N. 472.

"enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of his lessor, really is? all that is required of him is that, *having received the full consideration* for the contract he has entered into, he should on his part perform it." And, in a still more modern case—*Duke v. Ashby* (a)—also a case of lease by indenture, the same learned Judge says:—"The doctrine of estoppel between landlord and tenant is of a different kind from estoppel properly so called; *its object is to create a sort of specific performance.*" I need not point out the absurdity which it would be to speak of "specific performance," when the subject of performance, the land itself, is absolutely wanting. And, in the same case, Wilde, B., says:—"The landlord *puts the tenant in possession*, and the tenant *takes possession* from the landlord. Those facts taken together constitute an estoppel in the tenant against denying his landlord's title." And so, all the authorities which tell us that the assignee of the lessee is bound by the same estoppel as his assignor, give, as the reason, that "*the estoppel runs with the land, into whose hands soever the land comes.*" *Trevivan v. Lawrence* (b); *Palmer v. Ekins* (c).

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These authorities are, to my mind, abundantly satisfactory to show that in this special head of estoppel which exists between landlord and tenant (which Baron Martin calls a sort of specific performance), possession of the thing demised is an indispensable ingredient. If the possession, as well as the title, be in a stranger to the lease, why then, what pretends to be a lease is but an idle scroll; and the law is not so absurdly unjust as to insist on treating the rent as a reality, when the demise itself is a fiction and a myth.

If it be asked, is then the sealed indenture of no efficacy at all; is the estoppel constituted by the possession solely? I answer no. Both are essential to a complete and perfect estoppel, properly so called. I have referred to the authorities which prove that possession is essential. For the purpose of showing that so is an indenture necessary to the estoppel proper, I shall simply refer

(a) 7 H. & N. 600.

(b) 1 Salk. 276.

(c) 2 Lord Ray. 1551; S. C., 2 Swanst. 418, n. 1.

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to the distinctions taken in the passages from *Littleton* and *Coke*, already referred to (sections 58 and 47 *b*), and more clearly laid down by the Chief Justice in *Sullivan v. Stradling* (a).

Those latter authorities must however, I apprehend, be understood with this limitation, that the lessee by deed-poll or by parol gives up the possession before he pleads *nil habuit in tenementis*. So long as a tenant holds the thing demised he must pay the rent, and cannot inquire into the title of him under whom he holds it, whatever be the form of his lease: *Gilbert on Rents*, p. 146. But the difference I conceive to be this—that, while the lessee by deed-poll or by parol may let himself into the plea of *nil habuit in tenementis* by voluntarily throwing up the possession, the lessee by indenture cannot do so, so long as the right owner allows him to remain undisturbed. While he has, *or can have*, the possession, the indenture estops him from denying the title which he has admitted under seal. But the moment the right owner assumes the possession, the estoppel, it is admitted, disappears; and so, in my opinion, where (as here) the right owner has never been out of possession at all, there was never any estoppel at all. What is called a lease is merely a nullity.

The only quotation made by the plaintiffs' Counsel which seemed really to approach the precise point before us, was Sergeant *Manning's note* to *Doe v. Mills* (b). So far as the propositions in the *note* are applied to the facts of that case, they cannot be questioned. Williams was in possession without title of the bit of ground in dispute. Bullen, one of two rival claimants, induced Williams to accept a lease from him. Mills, the other rival claimant, purchased the premises from Williams; and Bullen having brought an ejectment for a forfeiture of the lease, it was held that Mills, no more than Williams, could dispute Bullen's title. It is plain that this decision does not in the least conflict with what I have been saying. Possession went there with the lease; for when Williams accepted the lease from Bullen, it was precisely as if he had first surrendered up the possession to Bullen, and then taken it back under the lease. Williams therefore, and Mills who came

(a) 2 Wils. 217.

(b) 4 Nev. & M. 28.

in under him, were estopped by the possession. So far as the *note* goes beyond the particular case (if it was meant at all to do so), I do not admit its authority. The passage cited from the *Year Book*, T. 9, H. 6, fo. 48, pl. 14, is merely a statement, in general terms, of a general rule. The only passage which really closes with the point before us is that cited from the argument of Counsel in *Plowden*, where it is said:—"In a lease by indenture both parties are concluded to say the contrary but that the lessor had the land in possession to pass, and that it passed in possession, according to the tenor of the lease." The Counsel it is said was *Plowden* himself; but I suppose we can hardly be expected to receive as an authority the *dictum* of Counsel *arguendo*, even though it be *Plowden*. I presume in his day, as in our own, Counsel suited their arguments to the necessities of their case, and to the idiosyncrasies of their auditors.

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It was said that if the lessors here had, after the lease, acquired the title to the part of the premises in which it was wanting, or if they should hereafter acquire it, the lease would attach on the estate so acquired, and that this shows the lease operated by estoppel from the first. To this I answer that, supposing the assumption to be well founded, it does not warrant the inference. When the estate is acquired, the possession becomes at once and thenceforth available for the purposes of the lease; and I can quite understand how it would be held that an estoppel immediately springs up, and attaches itself upon the new acquisition. But that does not in the least show that before the estate is acquired, or in case it never shall be acquired, there is any estoppel whatever in the case. I must moreover add, that I am by no means satisfied that the assumption itself is well founded. I am not aware that it has ever been held, nor am I quite sure that it would be held, that if a man, by an innocent form of conveyance, an instrument sounding in *grant*, assumes to demise the land of another, in which he has neither possession nor estate, that anything subsequently happening can give life to that which in its inception was merely null. *Right v. Bucknell* (a) was not the case of a release, in the sense of mere relinquishment of a

(a) 2 B. & Ad. 282.

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claim, but of a *conveyance* by lease and release: it was moreover a grant of a reversion as well as a release: yet it was held that there was no estoppel which would attach on the legal estate subsequently acquired. *Wivel's case* (a) was the case not of a release at all, but of a grant of the next avoidance of a benefice, by tenant in tail of the advowson, in which his son and heir joined. Tenant in tail died; and "it was adjudged that the grant was utterly void against the son and heir, because he *had nothing in the advowson, neither in possession nor right, nor in actual possibility, at the time of the grant.*" On this point, however, I express no opinion. It is enough to say that the state of things never has arisen, and probably never will arise in the present case.

For the foregoing reasons I am of opinion that the replication would be bad even if the lessees were the defendants. But the objections to it acquire additional point when we remember that the defendant is an assignee. I wish to put this, not so much in the way of a separate division of argument—*i. e.*, that even assuming that the lessees would be estopped, the assignee is not—as by way of further illustration of the position that no one is estopped at all. Whenever an estoppel exists, it is one of its qualities that it binds privies as well as parties. But why? For the reason given in the authorities I have already mentioned, namely, "the estoppel runs with the land into whose hands soever the land comes." But how can it run with the land if there be no land to run with? The plaintiffs say to the defendant, "You are estopped because you are an assignee;" but says the defendant, "How can I be an assignee when there is nothing to assign?" Oh, say the plaintiffs, "You are an assignee, because you are estopped to deny it; you are estopped because you are an assignee; and you are an assignee because you are estopped." The simple solution of all those absurdities is to hold that, when there is nothing, either of possession or of right, for the lease to operate upon, no one is precluded from showing the truth.

I do not rely on the case of *M'Loughlin v. Craig*, in the Queen's Bench here, as it is plain that the points discussed in this case were

(a) Hobart, 45.

not thought of there at all, save so far as glanced at in a sentence by Mr. Justice Crampton. *Neale v. M'Kenzie* belongs to the second branch of the case, where I shall have to consider it very fully.

I have now to add that, unless the plea can be supported on the ground I have stated, namely, that there never was any estoppel at all, I am of opinion that it cannot be supported at all. This is not a case of *eviction* by title paramount. To call it so seems to me to be simply to misuse language. Eviction means *dispossession* by course of law, not necessarily by legal process, but at all events the putting out of possession, by right, one who has it by wrong. Title paramount means title higher or superior to another title. The man who has the possession has a *prima facie* title; but the man who has the rightful title has a title superior or paramount to that *prima facie* title. But the meaning of the language evaporates when you attempt to apply it to the case of a mere impostor affecting to demise land to which he is an absolute stranger. If I make a lease of Buckingham Palace, and the lessee is wise enough to keep aloof, would anyone say gravely that he was evicted by title paramount? The Queen's title, paramount to my title, to Buckingham Palace! The truth is, that on the facts of this case nothing which *could* be done after the lease could vary the case from what it was at the moment of the lease. Title and possession, both being full of the right owner, it was apparent from the first that the *pseudo* lessee could do nothing to put himself in a better position; for surely the law will not hold that a man can give himself a defence he would not otherwise have had, by committing an illegal trespass on the property of another. What is it that takes place in case of an eviction by title paramount, properly so called? The lessee is at once let in to plead. What? Not merely that the lessor has *now* no title—not merely that the title which, by the species of specific performance spoken of by Baron Martin, he had down to this,—the offspring of possession and estoppel conjoined,—has been determined by eviction, but that, from the first moment, the lessor never had any title at all; in other words, to contradict flatly the assertion of the lease. Now the difference between that case and the present is simply this—the lessee here was, before the seal was cold, in

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precisely the same position as the lessee then was the instant after the right owner dispossessed him. In the latter case, the estoppel came with the possession, and vanished with the possession. In the former, it never came at all, because there was never any possession at all. "Can there," as Baron Parke asks in 2 *Cr. M. & R.*, p. 95, "be an eviction from that of which the party never was in possession?" There is not, in my opinion, the smallest difference between the plea in this action and that in *Domville v. Ward*. The allegations which are found on the record, of prevention and hindrance, and the like, are merely the necessary and legal consequences of the total absence both of title and possession. If issue in fact were taken on this plea, the Judge would be bound to tell the jury that all that need be proved was the title and possession of the strangers, and that all the rest followed as inference of law. Besides, the plea is not pleaded as a plea of eviction by title paramount. These averments of prevention and hindrance, if of any value at all, would be only so as evidence in proof of such a plea. The case of *Hunt v. Cope*, cited by Mr. O'Connor Morris from *Coup.*, p. 242, shows that eviction by title paramount is therefore wholly out of the case, first, because it is not pleaded; second, because the facts on the record would not prove it if it had been pleaded, but, on the contrary, show that, in the nature of things, it was an impossibility; the lease having been from the first moment a nullity as to these lands. The truth is, there is no middle course in the case. Either the lessee was estopped at the moment of the lease; and if so, he is estopped now, or he was not estopped either then or now; the truth must have way, according to its legal effect. The Counsel at both sides, in both cases, obviously came prepared to argue the case on that footing; and it is, in my opinion, the only one on which it can rationally be rested.

For the foregoing reasons, I am of opinion that the replication fails; that estoppel is out of the case; and that, consequently, the plaintiffs must meet the question of the legal bearing and value of the facts averred in the plea.

Discarding then the replication, and turning to the plaint and the defence, we find ourselves confronted by several questions both important and difficult.

They may be divided into three:—First; having regard to the Acts of Parliament recited in the lease, and to its other recitals, do the facts stated in the defence present even a partial answer to the plaintiffs' case; or is the whole rent enforceable notwithstanding the inefficacy of the demise as to part of the premises?

Second; if the whole rent be not enforceable, is any part of it? In other words, is the case one for a suspension of the rent, or only for an apportionment?

Third; if the true case be one of apportionment only, what is the effect of that as applied to this summons and plaint? Is it, as the plaintiffs insist, that the plea is bad *in toto*, because, being an answer only to part, it is pleaded in the whole? Or is it, as the defendant insists, that the plea is good *in toto*, because it shows that the action is misconceived both as to the subject it claims and the tenancy it describes? Or, lastly, can the Court give effect to the plea as a partial defence; and if so, what should be the form of the judgment, and what the method of getting the rent apportioned?

With regard to the first of those questions, I do not think it necessary to say more than this—that the argument I have heard has not satisfied me that there is anything so special in the Act of Parliament, the recitals or the subject of this lease, as to take it out of the ordinary rules applicable to such cases; I mean to cases in which a lessor includes in one lease, at a bulk rent, premises which do not belong to him with others which do.

The second question is by far the most important in the case; for it involves the consideration of what, apart from pleading technicalities, are the real rights of the parties under this lease.

In dealing with this question I shall confine myself altogether to a single consideration—namely, whether the case is within the decision of *Neale v. M'Kenzie*. If it be, I hold myself bound to submit to that authority. It is the unanimous decision of the Court of Exchequer Chamber in England, in which, after the fullest consideration, and in a most elaborate judgment, the decision

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of the Court of Exchequer was reversed: it has never been overruled, or even, so far as I am aware of, questioned. And I agree entirely with the Counsel for the defendant, that the deference which we are bound to yield to it should not be one of words or profession merely. And I go farther and say, that it would in my opinion be much the lesser evil of the two, openly to disregard and overrule it (futile as such a pretension would be on our part here), than to affect to distinguish it upon grounds illusory or unsubstantial.

What then is the principle which *Neale v. M'Kenzie* furnishes for our guidance in the present case? To extricate it from the mere specialties of the case some little care is requisite.

Now the principle to be extracted from that case, and which gives to it its value as applied to others, is this—that when a lease at an entire rent is in its inception void as to part of the premises, that is not a case of part eviction by title paramount, and consequently of apportionment of the rent, but of original nullity as to part, and consequently of suspension of the entire rent. The simple question then on which this case must turn is, whether this lease was void from the first as to a part of the premises professed to be demised; for if it was, it is ruled by *Neale v. M'Kenzie*. With the facts now before us, cleared from the estoppel attempted to be set up by the replication, no answer but one can rationally be given to that question. It is precisely as it would be if, in making this lease of the slobes of Lough-Foyle, they had included this Court-house. The difference between this case and *Neale v. M'Kenzie* is simply that the fact common to both, of original nullity as to part, is arrived at by different roads, in this case by a much more direct and straight one. In *Neale v. M'Kenzie*, as the lessor was seized of the reversion upon Charlton's lease, it followed that, if the lease to the plaintiff had been by indenture, that reversion would have passed, and the lease would have been good for the whole, as was in fact subsequently held in the Queen's Bench in this country in *The Ecclesiastical Commissioners v. O'Connor* (a). Therefore it was necessary to dwell

(a) 9 Ir. Com. Law Rep. 242.

on the fact that the lease was by parol. Again, if the second lease, although by parol, could have passed an *interesse termini*, as was held in the Court below, why there again it would have had effect out of the reversion, and it would be at the most but a case for apportionment. It was therefore necessary to go into the elaborate argument reported in the Exchequer Chamber to show an *interesse termini* did not pass. But in the present case we are carried high and clear above all such difficulties. The lessors simply had nothing in a part. The fee-simple and the possession were in strangers. Therefore this is beyond comparison a plainer case than *Neale v. M'Kenzie*, for the application of the principle there established.

One intelligible ground only was suggested for distinguishing the two cases. It was said that as this is a lease by indenture duly executed by the lessee, it took effect at first in its entirety—viz., as to the part the lessors had, by the passing of an interest; as to the part they had not, by estoppel; and that the prevention, by the owners of the latter, of the lessees getting possession, was in the nature of matter subsequent to the lease, and was consequently part eviction by title paramount, which works apportionment but not suspension. But, in the first place, this is merely going back upon the argument upon the replication. If there *be* an estoppel, the replication ought to be held good; and if so, all the other questions are out of the case, and the plaintiffs are, without more, entitled to judgment on the whole record. But if the replication be held bad—i. e., if there be *no* estoppel, then the true facts are before the Court, and it can and must allow to them their natural operation; and, to my judgment, it is mere trifling to say that the natural operation of these facts can be other than to make of this lease a mere nullity as to the strangers' lands. In truth this fancied distinction is wholly unfounded *in fact*. I early pointed out that the plea contains no averment of anything having been done after the making of the lease which could vary the situation from what it became on the instant of sealing and delivering the indenture. It amounts simply to this—that at that instant and from thenceforth the lessees were “ready and willing and desirous”

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to enter into possession; but that the possession being full, and full of the right owners, they were unable to do so. But all that was just as true the instant after making the lease as at the time of pleading, or at any intervening moment. If there was no estoppel when the plea was pleaded, there was none when the lease was made, because nothing at all happened in the interval. Suppose issue in fact were taken on the plea, must the defendant prove that he did some act towards taking possession, or that the owners did some act towards repelling him? Clearly not. All he need prove is the rightful seisin and possession of the strangers. But those were as perfect at the moment of the lease as at that of the plea. Anyone therefore who holds that the replication by way of estoppel is bad, is bound in common consistency, when dealing with the plea, to reject the supposition that at any time whatever this lease enured by estoppel; and thus the one even intelligible distinction suggested between this case and *Neale v. M'Kenzie* resolves itself into a fallacy. One of the defendant's Counsel being asked by the Court whether, if the replication were held bad, he could distinguish the case from *Neale v. M'Kenzie*, gave the answer which became his high standing and repute as a lawyer: he admitted that he could not. That answer I believe to be as sound as it was candid. The more I have considered the case, the more I have felt convinced that the view which was manifestly the one taken by that learned Counsel of his case was the true one—that the real stress of the argument is upon the replication, and that if the plaintiffs cannot by that obstacle succeed in shutting out the facts, they are without a case.

The plaintiffs' Counsel relied on some expressions of Lord Abinger (p. 763 of his judgment), in which he dwelt on the fact that the demise was not by indenture, and, in another passage, that the lessee was not bound by any estoppel, as indicating that the decision did not apply when the lease was by indenture. But the least attention to the case will show that the reason why Lord Abinger dwelt on the absence of an indenture was, because if there had been an indenture the lease would have taken effect as by

passing an interest in the whole of the demised premises, the lessor there being seized of the reversion upon Charlton's lease. But in this case the absence of all estate in the lessor produced precisely the same effect which the want of an indenture did in that case. And the estoppel Lord Abinger spoke of is shown by the context not to have been an estoppel by deed at all, but an estoppel by enjoyment. His words were—"had no enjoyment, and is not bound by any estoppel." The passages in the judgment which are really valuable, as showing that the principle of the decision embraces this case, are the one at p. 758, "The *impediment* to the plaintiffs taking possession is not analogous to an *eviction*;" and at pp. 763-4, "We are not aware of any case where an entire rent reserved has been held to be apportionable, *in which the tenant has not been at some period subject to the entire rent by virtue of the demise*. Here, the right of apportionment is not founded upon any eviction or other matter accruing subsequently to the demise; but upon an original defect in the demise itself, by which the entire rent was reserved.

Before I leave this part of the case, I desire to say a word upon a species of argument which was urged at both sides. The plaintiffs' Counsel told us, that, if we adopted the defendant's argument, we would be holding that for the remainder of the term of 300 years, this great tract of unreclaimed slob would be held rent free. The defendant's Counsel on the other hand told us, that if we yielded to the plaintiffs' argument, we should be making the defendant pay rent during the same term for what he never received. It would perhaps be too much to expect from Counsel that they would abstain from addressing such topics to a Court. They have sometimes to speak to their clients, as well as to the Court, and these are the considerations which, to the apprehension of their clients, of course constitute the pith of the case. But nevertheless a very bad compliment is paid to the Judges to whom, in an argument of this description, such reasoning is addressed. We are dealing here with a question of pure and abstract law; and if *Neale v. M'Kenzie* be otherwise applicable, it would be mere empiricism to withhold it, because in that case the subject, the term, and the rent were small,

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whereas in this case they are large. When *Neale v. McKenzie* was at argument it might fairly have been urged, and probably was urged, against the decision—the decision Court afterwards made that it would thereafter be applicable to long terms and large rents, as well as to the one before them; but the decision having been made and the principle established, these arguments are now utterly unworthy of judicial notice. If law is to make any pretension to the character of a science, or, which is of far more importance, of a certain and uniform rule of conduct, it is better that such topics should find no place at all in the reasoning on which a judicial decision is to be founded. For no matter with what professions of disregard and disclaimer the mention of them might be accompanied, countenance would assuredly be given to the notion that, even in the discussion of the driest questions of law, Judges are capable of being caught by hollow and plausible platitudes of the sort which commonly find favour with juries.

It is scarcely necessary to say that the 44th section of the Landlord and Tenant Amendment Act has no application to this branch of the argument; for if the case be not one of eviction, that section is, by its terms, excluded.

I have now stated my opinion upon two of the three questions which I mentioned; from which it follows that I think the defendant entitled to judgment on the whole record. But I think I ought not to refrain from stating my views upon the third question also, which I shall do more briefly.

Assume then that I am wrong upon the second question, and that the rent is not suspended but apportionable, would the present ejectment be maintainable? I am of opinion that, even on that supposition, it would not.

The plaint demands judgment for the possession of the whole of the premises professed to be demised by the lease, as being all held under the plaintiffs at a rent of £800. The facts averred in the defence show that the plaintiffs have no right whatever to the possession of a considerable part, which is not held under them at all; that their right, if any, is to a portion only of the premises, and that that is held under them, not at a rent of £800, but at an

as yet unascertained portion of that rent. It is perfectly clear that, under those circumstances, this ejectment would not have been maintainable before the passing of the late Landlord and Tenant Act, 23 & 24 *Vic.*, c. 154. The plaintiffs' Counsel admit this, but they rely on the 44th section of that Act.

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I am disposed to think that the better mode of administering that new enactment is to hold that in cases which come within it (supposing ejectment for non-payment of rent can be maintained at all until the rent has been apportioned in some other proceeding), the ejectment should be brought for what the plaintiffs are entitled to—i. e., for what is called in the section “the residue of the premises,” and should not include what they are not entitled to. I think a party who avails himself of this new statutable remedy should pursue the terms of the statute, and bring his ejectment for that only to which alone the statute saves his right, and I see no difficulty in so framing the plaint. Great inconvenience and great injustice might follow from holding otherwise. If the defendant does not take defence, the plaintiff will have judgment by default for the entire of what he claimed, though to a part of it he has no title. So, if the defendant takes defence, but does not appear at the trial, the plaintiff will be entitled to a verdict for the whole, without proof of his title, and can also if he pleases take a verdict for the whole rent—Common Law Procedure Act (1853) s. 205,—both directly contrary to right and justice. All this will be avoided by obliging plaintiffs to state their cases truly.

Furthermore, the facts in the plea, applied to the plaint, show that there is fatal error in the description of the tenancy. Mind, I say in the description of *the tenancy*. The plaint does not profess to describe *the demise* at all, but, speaking as at the time of pleading, describes a certain tenancy as then existing. But no such tenancy had then any existence either as to subject or to rent. If *non tenuit modo et forma* were pleaded, the variance would be fatal at the trial. But this defence, discarding the first few lines of it, which state a mere inference of law, amounts to a special *non tenuit*. *Stephenson v. Lambard* (a) was entirely different. That

(a) 2 East. 575.

E. T. 1865. was an action of covenant. The declaration described, not the
Common Pleas. tenancy as at the time of declaring, but, *per verba ab ante, the lease*,
 and described it quite correctly. The part eviction pleaded by the
 defendant did not show any misdescription of the lease, but only
 that by matter subsequent the plaintiff was entitled to a less sum
 than he was claiming; and he was allowed to recover the sum
 he was entitled to. But here the plaint purports to describe, not
 the lease, but, the tenancy as existing at the date of pleading;
 whereas no such tenancy did then exist, or in truth ever had
 existed at all.

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Upon the whole case, my opinion is :—first, that the replication is bad; second, that the facts in the plea show that the rent is suspended, and not merely apportionable; third, that even if it were apportionable, the ejectment in its present form is not maintainable; and, I need scarcely add, that I think the defendant is entitled to general judgment upon the whole record.

MONAHAN, C. J., delivered the judgment of the other Members of the Court.

In this case, I regret that I cannot concur in the judgment of my Brother CHRISTIAN. The facts of the case have been already so fully stated, that it is only necessary for me to refer very briefly to them. A lease by indenture was made, in the year 1845, of a large tract of land, for a term of 100 years, at a rent of £800 a-year; and it is a conceded fact that the lessees and their assignees have had possession of a great portion of the premises so demised; but it appears, and is so averred by the plea, that, with respect to a portion of the demised premises, the lessee or his assignees never got possession of it; that they have always been ready and willing to take possession, but have been prevented from so doing by reason of an estate in fee in that portion existing in third parties.

The first question in the case therefore is this,—there being a lease by indenture, executed by both the lessor and lessee, and purporting to demise, as well the premises of which the lessee never obtained possession, by reason of an outstanding estate in fee in third parties, as those which he now has the possession and enjoy-

ment of, what was the legal effect of that lease at the moment of its execution? It occurs to me, without going through the cases and authorities which have been cited, that it has been settled law, from the time of the *Year Books* down to the present day, that as to part (that is, the part of which the lessor had the possession and title), the lease operates in interest, and as to the rest by estoppel. The effect of the lease is to create a reversion in fee in the lessor by estoppel; and, should he afterwards acquire any estate in the premises, the estate of the lessee is converted from an estate by estoppel into an estate in interest. I confess it appears to me to be as well settled as any principle of law, that the nature of an estate by estoppel is this, that the moment a landlord who executes a lease of this kind acquires an interest in the premises, the estate of the tenant is transformed from an estate by estoppel into an estate in interest. There is a late case in which all the authorities are collected—I mean the case of *Cuthbertson v. Irving (a)*, in which the lessor, who had no legal estate in the premises, but merely an equity of redemption, demised certain premises to the defendant. The lease disclosed no infirmity of title, but demised the premises in the ordinary form; but by a deed, which showed that the lessor had no legal title, but only an equitable one, he purported to convey his reversion to a third party; and the question was, whether the latter could maintain an action of covenant against the lessee in the original lease. It was argued that, though the estoppel was binding as between the original parties, there could be none in favour of the assignee of the lessor, because the latter, not having the reversion at the time of the assignment, had nothing to assign; and therefore that his assignee could not maintain an action of covenant. But the Court of Exchequer Chamber held that, there being a reversion created by estoppel in the lessor, any deed which would have been sufficient to convey the legal reversion, if it had in fact existed, was equally good to pass the imaginary reversion by estoppel. That case only carries out the principle that the assignee of the lessor was entitled to the benefit of the estate created by estoppel, just as

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(a) 4 H. & N. 742; S. C., on appeal, 6 H. & N. 135.

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previous cases had decided that the assignee of the lessee was equally bound by the estoppel as the lessee himself.

The next question is, what effect has the state of facts in this case on the liability to the reserved rent, viz., where the lessee never gets possession of a part of the premises purported to be demised, and is kept out of possession by a title existing in a third person superior to his own and that of his lessor. Is he liable to the entire rent? The plaintiffs contend that he is; while the defendant, on the other hand, insists that he is not liable to pay any rent at all; that in fact the whole rent is suspended. I confess I entertain a very decided opinion that neither is right; for I am of opinion that the state of facts which existed here, though not literally an eviction by title paramount (for I am aware that to constitute an eviction by title paramount, strictly so called, there must be an actual putting of the party out of possession) is, however, equivalent to it, and ought to be attended with like results. I am not aware that any case has ever been decided, laying down such an absurd proposition as this, that if a landlord by mistake include in the parcels of a lease by indenture of some 300 or 400 acres of land, half an acre to which he has no title, the tenant is to hold the 300 or 400 acres for the whole term discharged of the rent. No such result would follow if we were to hold that the effect of that state of things is the same as if the tenant had been evicted from the half acre by title paramount.

It was said, during the argument, that no case similar to the present had ever been decided; but though perhaps there may be no direct authority to be found, we have been referred to several cases which, I may say for myself, have gone a great way in assisting me in forming an opinion on the present case; and, when we have a case before us which comes within the principle of any particular decision, and the mischief which has rendered that decision necessary, I, for my part, would feel no difficulty in extending the rule of that decision to a state of facts which equally calls for its application.

It has been decided or assumed, in several cases like the present, that the lessor is entitled to recover rent for the portion of the premises which the lessee actually enjoyed. In *Tomlinson v. Day* (a)

(a) 2 Br. & Bing. 680.

the plaintiff agreed to demise a mansion-house and farm to the defendant at a bulk rent ; and it was part of the agreement that the defendant should have the right of sporting over the manor in which the premises were situated, and should also have the occupation of certain glebe lands. It appeared that the defendant never got possession of the glebe lands, and that the plaintiff, though he undertook to do so, had not the power to demise the right of sporting. It also appeared that the lease could not legally have passed the right of sporting, though it could have conveyed the glebe lands and the rest of the premises. An action having been brought for the rent, the defendant paid into Court a sum of money, which he alleged was equivalent to the value of what he had actually enjoyed ; and the question was, whether he was liable to more. It was held that, though what had occurred was not strictly an eviction by title paramount, yet that it was equivalent thereto ; and the opinion of the Court was, that the defendant was liable to pay for what he actually enjoyed, but not for the part he had not got possession of.

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In the case of *Smith v. Raleigh (a)*, and in the *note to Stokes v. Cooper (b)*, it is laid down that, if the defendant be evicted from part, he has the option of giving up possession of the entire ; but, so long as he enjoys any portion of the premises demised, he is liable to pay for what he enjoys. We have then the case of *Neale v. M'Kenzie (c)*, which was much observed upon during the argument. That case was decided on the authority of *Gardiner v. Williamson (d)*, the facts of which were these :—There was a demise of a messuage and certain tithes at a bulk rent : the landlord distrained for arrears of rent ; and it was held that the distress was unjustifiable. But why ? Because the demise of the tithes was void ; and, inasmuch as the lease did not pass the whole thing demised, the rent never for a moment had a legal existence ; and, consequently, there was no subject-matter to apportion. But all that was decided in that case was, that there cannot be a distress

(a) 3 Camp. 513.

(b) 3 Camp. 514.

(c) 2 Cr., M. & Ros. 84 ; S. C., on appeal, 1 M. & W. 747.

(d) 2 B. & Ad. 336.

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for an unascertained rent; and because there was nothing to show what was the rent properly payable for the portion actually enjoyed, the Court decided, not that there was no other remedy to recover the rent, but that there could not be a distress for an unascertained amount, and therefore that the distress was wrongful.

Now, what was the decision in *Neale v. M'Kenzie*? The facts of that case were as follows:—There was a demise by parol of a dwelling-house and a certain quantity of land, at a bulk rent, for the term of one year. The landlord distrained for half a year's rent; and the tenant brought an action of trespass against the landlord for making the distress. It appeared that the plaintiff had never been able to get possession of a portion of the demised premises; and to the avowry of the landlord he replied that, from the time of making the lease, and thence to the time when the distress was made, he had always been ready and willing and desirous of entering into the possession and occupation of the entire of the demised premises, but that he was unable to do so on account of a person of the name of Charlton being in possession of eight acres, parcel of the demised premises, under a previous demise from the defendant. The Court of Exchequer, before whom the case first came, held that the rent was apportionable, and though the landlord had distrained for the whole rent, yet that the distress was lawful, because there was rent due under the demise. And Lord Abinger, C. B., who delivered the judgment of that Court, held that the facts of that case, though not strictly an eviction by title paramount, were equivalent to it, and therefore that the rent was apportionable. From that decision there was an appeal to the Court of Exchequer Chamber. No doubt that Court reversed the decision of the Court of Exchequer, but on the ground I have already stated, namely, that you cannot distrain for an unascertained rent; but where the rent is apportionable, then you may distrain for the larger rent; and the jury will, under the direction of the Judge, ascertain the amount to which the landlord is entitled. Lord Denman, C. J., who delivered the judgment of the Court of Exchequer Chamber, says, at page 758:—"But we are of opinion that the impediments to the plaintiff's taking possession in this case is not analogous to an

"eviction ; for it appears to us that no interest in the eight acres previously demised to Adam Charlton passed to the plaintiff by the demise subsequently made to him. The demise to Adam Charlton covered the whole time during which the rent distrained for accrued." Then, after referring to the argument that an *interesse termini* in the eight acres passed by the demise to the plaintiff, he says :—"If any interest in the eight acres did pass to the plaintiff under the demise to him, we might possibly be disposed to accede to this view of the case ; considering that eviction by title paramount means eviction by a title superior to the titles both of the lessor and lessee, against which neither is enabled to make a defence." He then goes on to say that, so far as regarded the eight acres, the demise to the plaintiff was absolutely void, because there was a tenant in possession, whose interest extended over the whole period of the plaintiff's demise ; and the lease being by parol, there could be no estoppel. He then cites *Shepherd's Touchstone*, that "If the second lease be by fine or deed indented" (he does not say any deed, but by deed indented), "then it may work by way of estoppel, both against the lessor and the lessee ; so that if the first lease happen by any means, as by surrender or otherwise, to determine before it be run out, then the second lessee shall have it." The proposition here laid down is one which I believe never was questioned, from the time of the *Year Books* down to the present day, viz., that, where an estate is created by estoppel, if a new interest be acquired by the lessor, the estate by estoppel is transformed into an estate in interest, though up to that moment the instrument operated only by estoppel. Then, in a subsequent part of the judgment, he says :—"In the case before the Court, which is not the case of a demise by indenture, the rent is reserved in respect of all the land professed to be demised, and to be issuing out of the whole and every part thereof ; and as the plaintiff, as to a portion of the land comprised in the demise (which might be great or small, as far as the principle is concerned), has taken no interest, and had no enjoyment, and is not bound by any estoppel, we are of opinion that the distress

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"made by the defendant is not justifiable, either in respect of the whole rent reserved or any portion of it." Lord Denman's judgment proceeds altogether on these grounds:—first, that there was no instrument to create an estoppel; and, secondly, that as the whole rent never had any legal existence, there was nothing to apportion, and therefore there was no power to distrain, the amount of the rent being unascertained. That I consider to be the effect of Lord Denman's judgment.

But if the whole rent had ever been payable, and if the facts of the present case, I do not say are, but are equivalent to, an eviction by title paramount, the question is, what effect has that on the rent reserved and payable under the original lease or contract between the parties? And I positively assert there is not one syllable in the judgment of the Court in the case of *Neale v. M'Kenzie* from which it is to be inferred that the opinion of the Court was, that the tenant was entitled to hold the portion of the lands of which he got possession rent free; nor that a fair amount of rent could not be recovered in an action of debt for rent; the case merely decided that the landlord was not entitled to the entire rent, and that he was not entitled to distrain for a portion or part.

It is unnecessary to advert to the old authorities on the subject, but I may refer to the cases of *Doe d. Vaughan v. Meyler* (a) and *Stephenson v. Lambard* (b), both of which establish that, if there be an eviction from part of the demised premises by title paramount, the rent is apportionable, and the apportioned part only can be recovered; and *Stephenson v. Lambard* decides that though you bring an action of covenant for the entire, you are entitled to recover the apportioned part. In that case the action was brought for the whole rent, and the defendant pleaded eviction by title paramount from an undivided moiety; the Court decided that though the facts stated in the plea would have been a good defence to a moiety of the rent, they were no defence to the entire, and accordingly they gave judgment for the plaintiff, but gave liberty to the defendant to amend his plea so as to be a defence to a moiety. That case has always been referred to as an authority for

(a) 2 M. & Sel. 276.

(b) 2 East. 575.

this proposition, that an eviction from part operates merely as a suspension of a part of the rent and not of the entire.

The next question is, whether an action of ejectment for non-payment of rent can be maintained for an apportioned rent, the defendant having been evicted from part. This Court has already decided, in the case of *Mercer v. O'Reilly*, that the 44th section of the late Landlord and Tenant Act is retrospective, and applies to leases made previously to the Act. It therefore appears to me that this case, though not strictly an eviction by title paramount, comes within the principle of eviction, and therefore within the operation of the 44th section of the Landlord and Tenant Act.

The only other question that remains is this: the action is one of ejectment for non-payment of rent; which is an action for the recovery of the rent as well as of the land; that action has been brought for the entire premises and rent; and the defence is a plea in bar to the whole cause of action; and there is then a replication of estoppel; and the question is, what should our judgment be on the whole record. I take it that all the facts are now before the Court; that this lease was by indenture executed by both the lessor and lessee, and that consequently an estoppel was created; and then we have these subsequent facts, which I call an eviction by title paramount of a part; and, by the 52nd section of the Landlord and Tenant Act, in any case where a year's rent is due, the landlord may maintain an ejectment: and the question is, is there anything in the case to prevent us, in the words of the 81st section of the Common Law Procedure Act (1853), giving judgment according to the very right of the cause. *Stephenson v. Lambard*, as I have already said, decided that though the landlord go for the entire rent he may recover a part; and in *Sir Edward Coke's Commentary on the Statute of Quia Emptores* (*Co. Inst.*, p. 513), it is said:—"The statute doth ordain that the feoffee of part shall hold *pro particulâ* of the lord, but it is necessary to be known how the same shall be apportioned." He then says:—"In this case, albeit the plaintiff did mistake the just residue upon the apportionment, yet shall he recover so much as is found by the jury to be due; for it were too hard, and a cause of multiplication of suits, and against

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"the meaning of the makers of this Act, that the lord should be driven in his assize or avowry, &c., to hit the just sum due upon the apportionment; but though he demand more, yet shall he recover but that just sum which is implied in these words, "*secundum quantitatem terræ*—i. e., *secundum quantitatem valoris terræ*; but if he demand less, he shall not recover the greater." He then goes on to show how the rent is to be apportioned:—"And albeit the grantee of part demand or claim more in his action of debt or avowry than is due, yet shall he recover so much as the jury shall find upon a just apportionment to be due." It therefore appears to me that this case comes within the 44th and 52nd sections of the Landlord and Tenant Act, and that there is nothing to prevent us giving our judgment on the whole record according to the very right of the cause. With respect to the case of *Mercer v. O'Reilly* I may mention that, in the argument before this Court, Counsel for the defendant conceded that inasmuch as the defence was pleaded to the whole rent, and it turned out to be an answer only to part, we should give judgment for the plaintiff for the entire; and accordingly we followed the precedent of *Stephenson v. Lambard*, and gave the defendant liberty to amend, but directed that in case the amendment was not made within a specified time, judgment should be entered for the plaintiff. The case afterwards went to the Court of Exchequer Chamber; the report of the decision of that Court has not yet appeared, but I have been furnished by the officer with a copy of the judgment of the Court as entered on the Court books, which is as follows.—[His Lordship here read the judgment.*]—It occurs to me that

* The publication of the report of the case of *Mercer v. O'Reilly*, in the Exchequer Chamber, has been unavoidably delayed. The following is a copy of the judgment of that Court:—

"Therefore it is considered by the said Court of Exchequer Chamber of our said lady the Queen now here, that the judgment of the said Court of Common Pleas be reversed, annulled and held for nought; and that as to so much of the demand of the said Robert Mercer as is for rent by him alleged to have accrued due before the 1st day of January 1861—viz., the gales due on the 25th day of March 1860, the 25th day of June 1860, the 25th day of September 1860, and the 25th day of December 1860,—that the said Edward O'Reilly be acquitted thereof and go without day and soforth; and that as to the residue of the demand

there is no difficulty in the present case in following that precedent, and in declaring, on the facts appearing on the whole record, that the plaintiff is entitled to an apportioned rent; but inasmuch as the Court has not the means of ascertaining the amount of the apportioned rent, that a jury be directed to ascertain it as they were ordered to do in *Mercer v. O'Reilly*.

On the whole case, therefore, it is satisfactory for me to think that we are not interfering with any well established rule of law from any feeling of hardship which our judgment might cause; and that our decision is at all events consistent with the justice of the case. On the one hand the landlord will not be entitled to rent for land which he never gave, and of which the tenant never had any enjoyment; while on the other hand the tenant will not be permitted to hold rent free, for the residue of the term, this large tract of land of which he has had the full enjoyment and possession; which would be the necessary result of holding that the entire rent is suspended,—for it seems clear that the plaintiffs, during the continuance of the demise, cannot interfere with the defendant's possession of the premises enjoyed by him under the lease; and that if his argument is well founded he is to hold it rent free.

Judgment for plaintiff for apportioned rent.

of the said Robert Mercer, that the said Robert Mercer ought to recover an apportioned part of the rent reserved by the deed of the 26th day of January 1857, in the summons and plaint in the action aforesaid mentioned, according to the value of that part of the premises demised by the said deed, and which remained to the said Edward O'Reilly after the eviction in his plea complained of. And because the said Court of Exchequer Chamber now here is not informed of the value of such apportioned part of the said rent so reserved as aforesaid, therefore let the jury ascertain the sum and soforth.

[The report of the case in this Court will be found in the 13th volume of the Irish Common Law Reports, p. 153.]

E. T. 1865.
Common Pleas.

THE IRISH
SOCIETY
v.
TYRRELL.

H. T. 1863.
Queen's Bench

M'NALLY v. OLDHAM.

Jan. 13, 15,
 21.

(*Queen's Bench.*)

The rule, that the publication of a fair and correct report of proceedings taking place in a Court of Justice is privileged, extends to the record of a judgment entered up on a warrant of attorney. But the publication must be correct, and without inference or comment.

A publication called "The Black List," professing to contain extracts from the Register of Judgments, set out the particulars of the judgments in separate columns. The columns con-

taining the names of the persons against whom, and by whom, the judgments had been entered up were headed respectively "debtors' names" and "creditor."

A plaintiff contained a count for libel, stating that A had recovered a judgment against the plaintiff, and that on the 19th of May 1860 the plaintiff had paid off the judgment; the count then set out the libel, which consisted of an extract of that judgment, published in "The Black List" of the 24th of May 1860, and added the following innuendo,—“Meaning thereby that the said judgment had been recovered against the plaintiff, and was then an existing liability against his estate and effects; and that the said A was then a creditor of the plaintiff.”

Defence.—That, before the publication complained of, the said A duly obtained a judgment against the plaintiff (stating the particulars of the judgment), and said judgment was duly enrolled and of record in said Court, and duly registered, and was not annulled or vacated or satisfied on record at the time of the publication; and that said publication was a matter so appearing of record, and registered as aforesaid.

This defence held bad on demurrer.

DEMURRER.—The first paragraph of the plaint stated, that heretofore, to wit, at the time of the committing of the grievances hereinafter complained of, and long before, the plaintiff was in business as a jeweller in the city of Dublin, and was in large trade and good credit in said city. That in the course of his said trade the plaintiff became indebted to one Edmund Johnstone, in the sum of £157. 4s. Od.; and that the said Edmund Johnstone recovered a judgment therefor in the Court of Exchequer, on the 17th day of May 1860, and thereon the plaintiff paid the amount of said judgment and costs, amounting to the sum of £164. 8s. 11d., on the 19th day of May 1860. And the plaintiff saith that the defendant during all the time aforesaid, and at the time of the committing of the grievances hereinafter complained of, was the proprietor and publisher of a periodical commonly called "The Black List." Yet the defendant falsely and maliciously printed and published of and concerning the plaintiff, in the defendant's said publication, commonly called "The Black List;" and on the

24th day of May 1860, long after said judgment had been satisfied as aforesaid, the words following, that is to say, "24th May 1860; debtors' names—M'Nally, George; address—College-green, Dublin; trade—jeweller (meaning the plaintiff); date—17th May 1860; Court—Exchequer; amount—£157. 4s. 0d.; costs—£7. 4s. 11d.; creditor—Edmund Johnstone;"* (meaning thereby, that the said judgment had been recovered against the plaintiff, and was then an existing liability against his estate and effects; and that the said Edmund Johnstone was then a creditor of the plaintiff). And the plaintiff saith, that by reason of such publication, the plaintiff's trade and credit were ruined, and the plaintiff thereby became bankrupt, to the plaintiff's damage, &c.

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Second paragraph:—And the plaintiff also complains that, being such trader as aforesaid, he the said plaintiff was in good credit in his said trade; and at the time of the committing of the grievances next mentioned, divers persons, and in particular—(here the plaintiff set out the names of several mercantile firms in England and Ireland)—were in the habit of delivering goods to him in his trade on credit; and that the plaintiff, on the 24th day of May 1860, was considered by said persons as a person who might safely be trusted with goods on credit, and was in fact at said time so trusted by them; and the plaintiff was not, on said 24th day of May 1860, and at the time of the committing by the defendant of the grievances hereinafter mentioned, indebted to Edmund

* The following is a copy of the publication complained of:—

N.B.—*Subscribers are reminded that, when ordering the List, they undertook and agreed that it should be strictly confidential and not communicated to other parties.*

No. 20.			24th May.			1860.	
Judgments.							
Debtors' Names.	Address.	Trade.	Date.	Court.	Amount.	Costs.	Creditor.
M'Nally, George	College Green, Dublin	Jeweller	17th May 1860	Ex.	£157 4 0	£7 4 11	Edmund Johnstone.

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Johnstone in the sum of £157. 4s. 0d., or at all. Yet the defendant, on the 24th day of May 1860, falsely and maliciously printed and published of and concerning the plaintiff the words following, that is to say—(here the count set out the words as in the first paragraph)—meaning thereby, that the said Edmund Johnstone was, on said 24th day of May 1860, a creditor of the plaintiff, and that the said plaintiff was on said day a judgment debtor of the said Edmund Johnstone in the sum of £157. 4s. 0d. and £7. 4s. 11d. costs; by reason whereof the plaintiff hath been and is greatly injured in his good name, credit, and reputation; and divers persons who had trusted the plaintiff in his trade with goods on credit, and in particular the said persons so named as above, ceased so to do, and withdrew their credit from the plaintiff, to his damage, &c.

The third paragraph, after commencing as the second, with a statement that the plaintiff was a trader, and in good credit, and that certain persons named therein were in the habit of trusting him in his trade with goods on credit, and that he was not, at the date of the publication complained of, indebted to one Edmund Johnstone in the sum of £157. 4s. 0d., or at all, of which the defendant had notice, proceeded:—Yet the defendant, on the 24th of May 1860, and divers other days and times, from thence up to the commencement of this suit, falsely published and represented, in writing, to the said persons so named as above, and to divers other persons, that the said Edmund Johnstone was a creditor by judgment of the plaintiff; and that the said plaintiff was in fact indebted to the said Edmund Johnstone in the sum of £157. 4s. 0d., with £7. 4s. 11d. costs, on the said 24th day of May 1860, although the defendant had notice as aforesaid that the said debt was paid; by reason whereof the plaintiff was injured in his good name, credit, and reputation; and divers persons, and in particular the said persons so named as above, withdrew their credit from the plaintiff, and ceased to consider the plaintiff a person who might safely be trusted with goods on credit, and refused any longer to deal on credit with the plaintiff; and the plaintiff thereby became ruined and bankrupt, to his damage, &c.

The fourth paragraph complained of a false representation in

writing, setting out the words as in the first, and putting the following innuendo on them:—"Meaning thereby that the said Edmund Johnstone was a creditor of the plaintiff."

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The fifth paragraph was for libel, varying the innuendo.

Fifth defence:—And, for a further defence to all the paragraphs of the plaint, the defendant says that the matter and publication and representation in writing by each of said paragraphs complained of is, and are, the same identical matter and thing, that is to say, the publication in said first paragraph in express terms sets forth and says that, before the said printing and publishing by the defendant, the said Edmund Johnstone, in said paragraph mentioned, duly obtained a judgment in the Court of Exchequer in Ireland against the said now plaintiff, for the sum of £157. 4s. 0d. for debt, besides £4. 7s. 11d. for costs of suit; and said judgment was duly enrolled and of record in said Court, and duly registered, and not annulled or vacated or satisfied on record, at the time of said publication and representation in writing; and said publication and representation in writing was a matter so appearing of record, and registered as aforesaid, and not further or otherwise, and was made *bonâ fide* and without malice.

Demurrer thereto.*

* The following points were noted for argument:—First; that the said fifth defence, so far as same is pleaded to the first paragraph of the plaint, does not disclose any defence good in substance; because said defence admits the sense imputed in and by the said first paragraph to the publication therein mentioned, but does not justify the publication in the said first paragraph imputed.

Second—Because the publication of the judgment in said fifth defence mentioned was not the publication of any public judicial proceeding in a Court of Justice.

Third—Because the publication of matter false in fact contained in a record of a Court of Justice by a person not a party to the said record, whereby another party sustains damage, is not in itself lawful or privileged.

Fourth—Because inasmuch as it appears by said first paragraph that the judgment therein mentioned was paid prior to said publication, and the defendant published said judgment as being at the date of the publication an existing liability against the plaintiff, any privilege for the publication of the record in said defence mentioned is taken away by the facts stated in said first paragraph.

The same points were noted with respect to the defence as pleaded to the second, third, fourth, and fifth paragraphs of the plaint.

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Heron and Samuel Walker, in support of the demurrer.Serjeant *Armstrong* and *Sidney*, in support of the pleadings.

Samuel Walker.—First; if this defence be considered a plea of justification, it is bad, for not traversing the innuendo in the first count, namely, that the judgment was at the time of the publication an existing liability. A defence which does not traverse the innuendo must be taken as admitting the sense imputed to the words by the pleader: *Edsall v. Russell* (a); *White v. Tyrrell* (b). And in *O'Connor v. Wallen* (c) a plea which passed by the words of the libel altogether, and applied only to the innuendo, was held good on demurrer. In *Hemmings v. Gason* (d) it was held that, since the Common Law Procedure Act, the question whether the innuendo is warranted by the words of the libel is one for the jury, and not for the Court. On this demurrer therefore it must be taken that the innuendo is not too wide.

Secondly; assuming this not to be a plea of justification, it is bad, for not showing some sufficient ground of privilege or excuse for the publication complained of. The defence is, in substance, that the publication was of a matter of record, and that it is within the protection extended to publications of judicial proceedings of Courts of Justice. But, in order to be privileged, the publication must be of something which has occurred in open Court while the Court is sitting *foribus apertis*. The ground of the privilege is, that the public are supposed to be present, and to hear what passes; and another reason for the protection is, that the public may exercise a salutary censorship over proceedings in Courts of Justice. But even this privilege has been restricted, for it does not extend to statements made by Counsel in open Court: *Saunders v. Mills* (e). And in *Hoare v. Silverlock* (f), Maule, J., says:—“I think it is impossible to say at this day that a fair account of “proceedings in a Court of Justice, not being *ex parte*, but in the “hearing of both sides, is not, generally speaking, a justifiable

(a) 4 M. & Gr. 1090.

(b) 5 Ir. Com. Law Rep. 498.

(c) 6 Ir. Com. Law Rep. 378.

(d) Ell. Bl. & Ell. 378.

(e) 6 Bing. 213.

(f) 9 C. B. 20.

"publication. I do not lay it down as an universal proposition. H. T. 1863.
 "Matters may appear in a Court of Justice that may have so Queen's Bench
 "immoral a tendency, or be so injurious to the character of an M'NALLY
 "individual, that their publication could not be tolerated." The v.
 privilege is strictly confined to proceedings in Courts of Justice; OLDHAM.
 for instance, it does not extend to the publication of what occurs
 at public meetings: *Davison v. Duncan* (a); nor, until the 3 & 4
Vic., c. 9, to the publication of proceedings in the Houses of Par-
 liament.

In *Popham v. Pickburn* (b), the publication of a report, made by a medical officer of health of a vestry board, though in pursuance of an Act of Parliament, was held not to be privileged, though made without comment. But this was not the publication of a matter occurring in open Court; for it is to be taken on this demurrer (as the fact was) that the judgment was entered up on a warrant of attorney. He cited on this point *Lewis v. Levy* (c) and *Andrews v. Chapman* (d).

But, admitting that the protection extends to the publications of matters of record of this kind, this was not a fair and correct account of the judgment, and therefore not within the privilege; for the innuendo avers that the effect of the publication was to represent this judgment as an existing liability, whereas at the date of the publication it was paid off.

Serjeant *Armstrong*, and *Sidney*.

It is admitted that if this were a plea of justification, the defendant must justify the words in the sense imputed to them by the pleader. But this is not a plea of justification: it is more in the nature of a plea of not guilty; it states what the defendant actually did, viz., that he published a portion of the record of a Court of Justice, and that he did so *bona fide*, and without malice; averments which were never found in a plea of justification.

Again, the plaint discloses no good cause of action. There is no averment in any of the counts that the words were published of the

(a) 7 Ell. & Bl. 229.

(b) 7 H. & N. 891.

(c) Ell., Bl. & Ell. 537.

(d) 3 C. & K. 289.

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plaintiff in his trade, or touching his solvency and credit as a trader; the averment simply is, that the defendant falsely and maliciously published, "of and concerning the plaintiff, the words following," &c. It is no libel to publish of a man that a judgment has been entered up against him. In *Parmiter v. Coupland* (a), Parke, B., gives a definition of libel, which has been adopted by both Judges and Text-writers since:—"A publication," he says, "without justification or lawful excuse, which is calculated "to injure the reputation of another, by exposing him to hatred, "contempt, or ridicule, is a libel." This publication does not come within that definition. It is no injury to a man's reputation, nor a matter calculated to expose him to hatred, contempt, or ridicule, to say of him that a judgment has been entered up against him; for judgments are now one of the most common forms of security. It is true there is an averment that special damage has ensued; but the averment of special damage will not render actionable words which are not in themselves actionable: *Kelly v. Partington* (b). He cited also 1 *Wms. Saund.*, p. 244 b, n. (q); *Edwards v. Bell* (c); *Clarke v. Taylor* (d); *Morrison v. Harmer* (e).

Secondly; this was the publication of a part of the record of a Court of Justice, and therefore was privileged. It has been contended that this, being a judgment entered upon a warrant of attorney, did not come within the privilege, which it is said extends only to the publication of what occurs in open Court. There is no such restriction of the rule. By the Common Law, the public have a right to the inspection and exemplification of the records of the Queen's Courts; and by the 46 *Edw.* 3 that right was extended to cases in which the Crown was a party. The right is recognised by the 7 & 8 *Vic.*, c. 90, which consolidated the offices for the registry of judgments into one; and the 11th section of that Act entitles anyone to search for judgments, &c., on payment of a small fee. In the case of *In re Bagot* (f) it was held that that statute had taken away the right to make searches anywhere but in the office

(a) 6 M. & W. 108.

(b) 5 B. & Ad. 645.

(c) 1 Bing. 403.

(d) 3 Scott, 95.

(e) 3 Bing., N. C. 759.

(f) 8 Ir. Law Rep. 295.

created by it. But that was remedied by the 12 & 13 *Vic.*, c. 107, ss. 110–113, re-enacted by the 20 & 21 *Vic.*, c. 60, ss. 333, 334. The general law on the subject will be found in *Taylor on Evidence*, s. 1340.

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In *Lewis v. Levy* (a) one of the reasons given by Lord Campbell, C.J., why the proceedings of Courts of Justice may be published, is, that the Court are there to control the proceedings, and prevent the introduction of irrelevant matters. That reason is not confined to matters occurring in open Court; and in the same case Lord Campbell, referring to *Curry v. Walter* (b), says:—"In *Curry v. Walter* it was decided, above sixty years ago, that an action "cannot be maintained for publishing a true account of the proceedings of a Court of Justice, however injurious such publication may "be to the character of an individual." In that case the publication was a report, in *The Times* newspaper, of an application for a rule to show cause why a criminal information should not be filed against Magistrates for a conspiracy corruptly to refuse a license to a public house: and the report set out the contents of the affidavits filed in support of the rule. And there, though the application was *ex parte*, it was held that the action could not be maintained. *Cooke v. Wildes* (c) overrules *Tuson v. Evans* (d), and lays down the rule that, if the privilege exists in the first instance, the question whether the exercise of that right has been improper or excessive is for the jury.

But the case of *Fleming v. Newton* (e) is exactly in point. It was an application by the respondent to the Lord Ordinary, for an interdict to restrain the appellants from inserting his name in a certain publication called "*The Scottish Mercantile Society's Record*" (a publication similar in all respects to the present), which contained a list of the names of persons whose bills had been protested, and against whom protests had been recorded under an Act of Parliament which gave a registered protest the force of a decree; and in this respect the registered protest was much in the nature of

(a) Ell., Bl. & Ell. 537.

(b) 1 B. & P. 525.

(c) 5 Ell. & Bl. 328.

(d) 12 A. & E. 733.

(e) 1 H. of L. Cas. 363; S. C., 6 Bell's Scotch App. 175.

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a judgment entered up on a warrant of attorney. An interdict was granted by the Lord Ordinary; and the case went on appeal to the House of Lords. It was contended there, first, that the publication was most injurious to the respondent, by affecting his credit; and, secondly, that the register of protests was not open or intended for publication. But Lord Cottenham, L. C., reversed the decree of the Court below, and discharged the interdict; and at page 191 (after referring to the Act creating the register of protests) he says:—"The effect of this is to give this registration the "effect of a decree or judgment of the Court of Session. It is what "in this country we call a judgment upon a warrant of attorney. "In neither case does the Court interfere; but in both, as in cases "of judgment by default, and decree in absence, the party having a "right to the authority of the Court to confirm his claim obtains "the judgment as of course. Whether it be obtained by authority "of Parliament, or by the consent of the parties, or by the practice "of the Court, appears to me to be immaterial. It is for all purposes a judgment of the Court until altered or reversed, and "entitled to all the attributes of any judgment after the longest "and most contested litigation." He then, after showing that the register was open to the public, comes to the publication in the case, and says:—"That each of the defendants might go or send "to the office, and search the register, is not disputed; or that "they might communicate to each other what they had found "there, is equally certain; but what they have done is only doing "this by a common agent, and giving the information by means "of printing. No doubt if the matter be a libel, this is a publication of it; but the transaction disproves any malice, and "shows a legitimate object for the act done." And, accordingly, the Lord Chancellor discharged the interdict. That case is similar in every respect to the present, and is a direct authority in favour of the defendant.

Heron, in reply.

Fleming v. Newton was not the case of a demurrer to a plea of privilege, but an application for an interdict, which is in the

nature of an injunction; and the reason why Lord Cottenham refused the interdict was, that the party had mistaken his remedy.—

[LEFROY, C. J. There is also this difference between that case and the present—there, the publication was true; for the party had suffered his bill to be protested, and the protest had been registered; but whether that be like the case of a man publishing of another that he is indebted to a certain person in a certain sum, when at the time he is not so indebted, is in my mind very questionable].

He cited *Waterfield v. Chichester* (a); *Styles v. Nokes* (b); *Rex v. Creveagh* (c).

Cur. adv. vult.

On this day the Court delivered judgment.

Jan. 21.

LEFROY, C. J.

This case comes before the Court on a demurrer to the fifth defence. During the argument, the defendant adopted a course which he had a perfect right to do. He objected to the plaint, on various grounds, as not stating a case entitling the plaintiff to recover. The case is one of considerable importance: it concerns the public, or at least a very large and important class of the public, as well as the plaintiff. The nature of the case itself and of the defence which has been put forward will be best known from a statement of the summons and plaint and the plea which has been demurred to. There are involved in the case both questions of law and questions of fact; and upon the law and the fact, and the result of both, we are of opinion that the plaintiff has shown a just and sufficient cause of action, and that the defence does not disclose a sufficient ground either of justification or excuse. The action is brought by the plaintiff as a trader, alleging not only that he was a trader in good credit, but he states particularly the names of several persons with whom it was of importance that his credit should be maintained,—persons who supplied him upon credit with goods suitable for his trade. After that statement,

(a) 2 Mod. 118.

(b) 7 East, 493.

(c) 1 M. & Sel. 273.

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both as to his credit generally, and as to the persons whom he names as giving him credit, and who were induced by this publication to withdraw from him the credit they had previously given, the plaint goes on to state.—[His Lordship here read the first paragraph of the summons and plaint.]—This charge is repeated through the other four counts or paragraphs, with different circumstances of more or less aggravation. One of these circumstances is, that in consequence of this publication the plaintiff was driven to bankruptcy and ruin; another is, that the defendant knew at the time he made the representation that it was false. I think that I have now adverted to almost every fact necessary for the consideration of this case. I now come to the defence which has been put in, making however these preliminary observations; that the action has been brought by the plaintiff as a trader for injury done to him in his trade; and also that the plaintiff has by an *innuendo* attached a meaning to the words complained of, in which meaning he says they were used and applied, and in which meaning the defendant must justify or excuse the terms made use of if he has a justification or excuse. That is a principle of law upon which we are all agreed, and with regard to which we have this very candid and proper admission by the Counsel for the defendant, that a plea of justification or excuse must justify or excuse the words in the sense imputed to them by the *innuendo*.—[His Lordship now read the fifth defence.]—The charge in the first count of the summons and plaint is, that at the date of the publication, that is to say, on the 24th day of May 1860, the defendant falsely published of the plaintiff that he was a judgment debtor of one Edmund Johnstone, in the amount of a certain judgment; and it is here stated, as a ground of defence to that charge, that the defendant published that judgment as it stood on the record, and that, as it stood on the record, it was not annulled or vacated. But that averment is not true, for according to the allegation in the plaint, which is not denied, this judgment had previously been paid off, and therefore it was in substance and in reality annulled: whereas it is held out to the public that, at the date of this publication—viz., on the 24th of May 1860, the

plaintiff was a debtor by judgment, that the judgment had been duly registered, and therefore that it was a judgment upon which execution might have forthwith issued. Passing by then the allegation in the plaint (as he does by not traversing it)—viz., that previously to the date of the publication the judgment had been in truth annulled by actual payment—which is as complete a satisfaction and destruction of the efficacy of the judgment as if it had been vacated on record—the defendant puts forward, as matter of justification in his defence, that he had a right to publish the passage complained of, as it was matter of record and part of the proceedings of a Court of Justice. He would have been justified in what he did if he had published the judgment as it was in reality—viz., a judgment annulled and satisfied. But instead of that, and availing himself of a legal right, which none of us mean to question—a right to publish a true copy of a judgment,—the defendant has added a sting to his representation, namely, that at the date of the publication the plaintiff was a debtor by judgment, and that the judgment was unsatisfied. And if the defendant add a sting to his representation inconsistent with the truth, it then becomes an exercise of a legal right, with an addition which makes it injurious to the plaintiff in a way that it would not have been if the defendant had represented the whole truth of the matter. I shall now advert to another allegation to which no answer has been given—namely, that previously to the date of the publication, the defendant knew and was apprised of the fact that the judgment had been paid off. It would have been enough to give a cause of action, if the allegation had been made without any qualification, for the publication was with respect to a trader, and it represented him in a condition, with regard to this judgment, which was false in reality; and whether the defendant knew that the representation was false or not, if he made it of a trader, he made it at his peril; and the peril has ensued and been realised. For the allegation is (and this is not denied), that the very persons who had been in the habit of giving him credit previously, upon the occasion of this publication withdrew their credit, the consequence of which was that the plaintiff was driven to bankruptcy and ruin.

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Now that is the case we have to deal with on this record. It was contended in argument that though this was published of a trader theretofore in good credit, and who has by reason of this publication been brought to bankruptcy and ruin, yet that the plaint does not contain a good cause of action.

It was said at the outset that this was no libel; because, according to the definition of libel given by Parke, B., that is only a libel "which reflects on the *character* of another, and is published "without justification or excuse." Why, to be sure, in such a case as that, where the language is not defamatory, and no innuendo added to show that it was used in a defamatory sense, the party cannot sustain his action. But this is not a charge of defamation, nor does the party complain of injury resulting to his character from defamation; it is a libel upon a trader, affecting his credit, affecting his property—a false and malicious libel. And although it is attempted to be made out by the defence that the publication was *bonâ fide* and without malice, yet upon the admitted state of facts, which contradict that averment, the defendant cannot avail himself of those general words in the plea in order to screen himself from the consequences of an act which it is admitted he has done, and has done also in the sense imputed to it upon this record. But while I apprehend that it is impossible for us to hold that this is not a libel, and a perfect libel *quâ* libel, I will suppose it not to be a libel in the strict technical sense of the word. Under the late Act of Parliament however the party is at liberty to add to his summons and plaint an action on the case for false representation of him as a trader, in respect of his trade, from which injury has resulted; and I apprehend that there can be no possible doubt that the plaintiff could sustain such an action, where the false representation has been made of him as a trader with respect to his credit and circumstances, when actual injury follows and is the result of that false representation. There is in such a case both *damnum* and *injuria*: and therefore the objection that this publication is not strictly a libel, and that it has not been stated with all the strictness that would become a count in libel, fails, especially when we consider that special demurrers are now abolished. It is at all

events a false representation respecting a man as to his trade and circumstances (and false as to the knowledge of the defendant), which has, according to the admission in the pleadings, brought upon him ruin and bankruptcy; and it cannot for a moment be doubted but that it affords a good cause of action, if it be not justified or excused. But what justification or excuse is put forward here for representing that the plaintiff was at the date of this publication a debtor by judgment, and that the judgment was an existing liability; for that is the innuendo laid in one of the counts, and which is admitted, it not having been traversed or denied?

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It was argued, upon the authority of that case from Scotland (a), which came on appeal before the House of Lords, that a publication of this kind was justifiable. That case came before the Scotch Courts upon an application for an injunction; for in that country a jurisdiction, of which we know nothing here, belongs to the Court of enjoining a party from publishing matter which the Court deems libellous; the injunction was granted to prevent the publication of matter which the party justified himself in publishing on the ground that it was published under the authority of an Act of Parliament in force in Scotland, according to the provisions of which statute, a record was to be kept of persons in trade who had suffered their bills to be protested, and an authority was given, for the benefit of the "lieges" (as it was said), of publishing a list of merchants or other persons who had suffered their bills to be protested. There was accordingly a publication concerning the plaintiff, that he had suffered his bill to be protested; and the case made upon an appeal before the House of Lords against the injunction was this, that the publication complained of was both justified by law and allowed by Act of Parliament. That case was attempted to be pressed into service here, because it is by law allowed to the party to go to the record and get a copy of it; and it was said, and properly said, that he had a right to publish the copy of that record; and if he had published it simply as it stood on the record, he would have brought himself within the protection of that

(a) *Fleming v. Newton*, 1 H. of L. Cas. 363; S. C. 6 Bell's Scotch Appeals, 175.

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Scotch case, because then he would have published it as it really existed. But forgetting altogether that he was entitled to publish this judgment only as it existed on the record, he has added to it that which did not appear on the record, and which gave to it a sting which deprived the party who had paid off the judgment of the benefit of his payment, which had the effect of annulling the judgment, and not leaving it, as it was published to be, "a subsisting liability." The publication of the protest of the bill in the Scotch case was the publication of a truth, for the plaintiff had suffered his bill to be protested; and I may observe that, to allow even of that publication, it required an express Act of Parliament; and the defendant could only have the protection of that Act of Parliament by his publication being according to the truth of the transaction. The defendant in that case published that, at the date of the publication, there was existing a protested bill of the plaintiff; but here the publication is, that there was a judgment unvacated and unannulled, on foot of which there was an existing liability; and though the party may have had a right to publish the judgment as it stood on the record, he had no right to add to it a sting which gave to it all its pernicious consequences; for so far from it being a subsisting judgment, at the date of the publication, it was as much an annulled judgment as if it had been vacated or satisfied on record; for the Act of Parliament which allows a party to plead payment as a defence to an action on a judgment enacts that it shall be a satisfaction of the judgment as much as a satisfaction on the record. Our judgment therefore must be for the plaintiff, and the demurrer will be allowed.

O'BRIEN, J.

I concur in the judgment of the Court, that plaintiff's demurrer to the fifth defence should be allowed. Some of the counts in the summons and plaint are framed expressly as in libel, and others as for a false representation. The first, second, and third counts state in substance the meaning of the publication to have been that, *at the date of the publication* (24th of May 1860), Johnstone was a creditor of plaintiff on foot of the judgment, and

that plaintiff was *then* liable on the judgment. The meaning of the publication is not so clearly stated in the fourth and fifth counts; but it has not been disputed in the argument that they also impute to the publication the meaning that Johnstone was at the date of it a creditor of the plaintiff in respect of the judgment. The defence, however, relies upon the judgment having been in fact obtained, registered, &c., *before* the time of the publication; and, on its not having been then vacated or satisfied, without stating that Johnstone was *at that time* a creditor of the plaintiff in respect of the judgment, or that plaintiff was then liable, or owed any money on said judgment. This being so, it was admitted by defendant's Counsel, in the argument, that, with respect to the counts in the libel (first, second, and fifth), the defence could not be sustained *as a justification* of the libel, because it does not justify it in the sense imputed to it by those several counts. And I see no reason why we should not also hold it bad *as a justification*, with respect to the third and fourth counts. Those counts ascribe to the publication a certain meaning, which it admittedly bears, and complain of it in that sense as conveying a false representation, which was made by defendant with knowledge of its falsehood, and which caused damage to plaintiff in his trade; and the defence, without denying that such representation was made, or alleging that it was true, merely states facts which are consistent with its falsehood. Defendant's Counsel, however, rely upon two other grounds, as entitling them to judgment upon this demurrer. They contend, first, that none of the counts in the summons and plaint, either those for libel or those for false representation, state a good cause of action; and, secondly, that even if they do, the defence is a good answer to all of them, as a plea of matter of excuse, and as showing that the publication was privileged. With respect to the first ground, so far as regards the counts for libel, defendant's Counsel relied upon a part of Baron Parke's judgment in *Parmiter v. Coupland* (a), in which he states that "A publication without justification or lawful excuse, which is calculated to injure the

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(a) 6 M. & W. 108.

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"reputation of another, by exposing him to hatred, contempt or "ridicule, is a libel." And defendant's Counsel contended that the publication complained of is not a libel, because it does not come within that description. But this statement of Baron Parke, made with reference to the case before him, that such a publication as he described would be libellous, cannot be relied on as intimating his opinion that no other publication would be so; and there is no doubt, upon authority, that a publication calculated to injure a trader's credit, and attended with that result, is libellous if made without justification or lawful excuse. In the case now before us, the meaning of the publication, according to the innuendoes in the summons and plaint, is, that a judgment obtained against plaintiff on the 17th of May 1860, for £157. 4s. 0d. and costs, remained unpaid on the 24th of May, and was then due by plaintiff. It is not denied that the innuendoes are warranted by the publication; and I think it clear that such a publication of a trader's continuing liability to a judgment debt, on which execution might be issued, or other summary proceedings taken against him, is calculated to injure his credit. A judgment may be obtained against a trader in an action which he resists, because he thinks the demand ill-founded; but the effect would be different if it appeared that he allowed the demand to remain unpaid after his liability to it was decided, and a judgment obtained; and the summons and plaint expressly states the effect to have been injury to plaintiff's credit, and damage to his trade and business. I think it clear therefore that the several libel counts disclose a good cause of action; and I am of the same opinion as to the counts for false representation (third and fourth). Those counts do not use the word "libel," but they complain of the publication as a false representation made in writing to several persons, and state that defendant when he made it had notice of the real facts. It has been suggested that, under the general form of pleadings allowed by the Common Law Procedure Acts, these counts may be considered as substantially counts for libel; but at all events they disclose, in my opinion, a good cause of action, as they state that defendant, by making a false representation when he had notice of the true facts, wilfully committed a wrongful

act calculated to injure the plaintiff, and from which the plaintiff suffered pecuniary damage.

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The second ground upon which defendant's Counsel have sought to sustain the defence, and that upon which they have principally relied, is, that the publication was privileged, as having been a statement made *bonâ fide*, and without malice, of the proceedings of a Court of Justice. On this point they referred, amongst other cases, to that of *Fleming v. Newton (a)*, where Lord Cottenham, in delivering the judgment of the House of Lords, stated in effect that, as it was lawful to publish the proceedings of a Court of Justice, it was also lawful to publish the judgment, which was the result of those proceedings. In that case a book called "*The Black List*," as in the case now before us, was published under the direction of a society of merchants in Scotland, and contained, amongst other matters, a copy of the register which was kept of protested bills, stating the names of the parties thereto, and other particulars. That register was kept under the authority of various Acts of Parliament, which also directed that the register should be open to public inspection. It was contended for the publisher that the publication of the register was merely the publication of a judicial record, and was therefore privileged; and the decision of the House of Lords was in favour of the privilege. But in that case there was no ground for contending that the publication was untrue, or was so made as to convey a meaning contrary to the truth. In the case now before us, it is true that previous to the time of the publication the judgment therein mentioned had been obtained; but the publication complained of states that fact in such a manner, with respect to dates, as to imply, contrary to the truth, that at the time of the publication the judgment remained unpaid, and that plaintiff was then liable thereon. Such is the meaning ascribed by the innuendoes to the publication; it is not denied by the defence, and it has not been disputed in the argument, that such innuendoes are warranted by the publication. Although then it is clear, from the decision of the House of Lords, that the privilege which exists of publishing the proceedings of a Court of Justice, includes the

(a) 1 H. of L. Cas. 363.

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publication of the judgment of that Court, yet that privilege cannot be extended to the publication of the judgment or other proceedings, in such a manner as to convey an imputation which is untrue, according to the state of facts existing at the time of publication, and which is attended with injury and damage to the party named. The publisher should at his peril ascertain that he does not exceed his privilege, and that his publication does not express or imply what is not warranted by the facts. In the present case the judgment was obtained a week before the publication, and was paid in the interval; and, even if the defendant was ignorant of the fact of payment, he should not have framed his publication in such a manner as to imply that the judgment was still due. Defendant's Counsel have put the case of a trial or other proceeding in a Court of Justice, lasting for several days, where the proprietor of a newspaper published each morning a full account of the previous day's proceedings, although the statements of Counsel and evidence for one party may convey charges injurious to the character of the other party, whose case had not yet been opened. And they contend that as, in such a case, the publication would be privileged if it contained a true and fair account of the day's proceedings, we should accordingly hold the publication now before us privileged, as it truly stated the fact of the judgment having been obtained at a particular time. But in that case one ground for holding the publication privileged would be, that it correctly stated the facts as existing at that time, and did not state them in such a manner as to convey an impression contrary to the truth. Such a case is therefore materially different from the present.

I am, accordingly, of opinion that the defence before us fails, not only as a justification, but also as a plea of matter of excuse or privilege; and that as the several counts disclose a good cause of action, the plaintiff is entitled to judgment on this demurrer.

HAYES, J.

I have little to add, except to express my concurrence with the principles already laid down. The declaration consists of two sets

of counts; one set, consisting of two counts, is for false representation by the defendant, of the plaintiff, the defendant well knowing the falseness of the representation at the time it was made. That each of those counts discloses a good cause of action there can be no question. The other set of counts I shall continue to call, notwithstanding what I have heard, counts for libel,—understanding by the term libel the publication of a defamatory writing without justification or excuse for so doing. And the mention of these terms suggests to me the question,—is this plea, which goes to all the counts, either a plea in justification or excuse to any of the counts? I think it is neither the one nor the other to any of them; although I am disposed to think the pleader intended that it should be, not a plea of justification, insisting on the truth and absolute correctness of what the defendant had done, but rather a plea in excuse, urging that the defendant was not legally responsible, and ought to be protected, as he was only exercising a legal right when he printed and published the record of a judgment of one of the Superior Courts. A great deal of argument has been expended, and many cases cited, to prove that every one in the community has a right to publish the records of a Court of Justice. I fully admit that proposition in the abstract, and I would be disposed to do so even without the authority of that case from Scotland. In my opinion that is the right and privilege of every subject; but like every privilege the subject has, he exercises it at his peril. He must be cautious that he does not transcend it, and he should carefully bear in mind this maxim, "*sic uteri tuo ut non alienum lædas.*" In the present instance the defendant has not done so. He has not merely published the proceeding of a Court of Justice, but he has done so with a false representation and injurious inference to be drawn from his act, upon which the whole cause of action depends. It might not be actionable to say that, on yesterday, or yesterday week, an action was tried which resulted in a judgment against the plaintiff; but if three or four days or weeks after not only the decision of the case, but the payment of the amount of the judgment, the defendant publishes that the relation of debtor and creditor still subsists between the parties, and by that

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means injures the character and credit of the plaintiff, he must be responsible for transcending and abusing his privilege; and it is no excuse for what he has done to tell us that there is a record existing on the files of the Court, of a judgment unvacated and unannulled; a fact which is not denied, but which affords no excuse for what the defendant has done.

Upon these principles, as old as the law, I think we ought to hold that the plea cannot be sustained, and that the demurrer should be allowed.

Demurrer allowed.

GEORGE SCOVELL and WHITMORE SCOVELL

v.

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May 27, 28,
29.
June 9, 10, 11,
27.

WILLIAM PUGH GARDINER, Collector of Customs for the
Port of Dublin.

In 1848 defendants, on behalf of the Crown, demised certain premises in D. to plaintiffs, for twenty-one years. The lease recited that the plaintiffs were in

SPECIAL CASE.—The action was brought to recover a sum of £220, for money paid by the plaintiffs for the use of the defendant, as collector of customs, at his request; and for money received by the defendant for the use of the plaintiffs; and for money found to be due from the defendant to the plaintiffs on accounts stated between them.

the actual possession of the said premises, and provided that the plaintiffs were "not to be liable for or to pay any rates or taxes whatever, charged or chargeable upon the said demised premises, or any part thereof, save and except their legal proportion of the poor-rate." The D. Corporation Waterworks Act 1861 authorised the corporation of D. to levy, in place of certain rates theretofore levied, a rate to be called the "Domestic Water Rate," upon and from the occupiers of all houses within the borough of D. This rate defendants refused to pay.

Held, that, as between the lessor and lessee, the defendants were liable for the rate.

Held (per LEFROY, C. J., and O'BRIEN, J.), that "chargeable" has a future meaning.

Held (per O'BRIEN and FITZGERALD, JJ.), that the Domestic Water Rate, though not chargeable on the premises, is chargeable on the occupier in respect of his occupation, and so within the proviso.

Held also (per O'BRIEN, J., *dissentiente* FITZGERALD, J.), that the Domestic Water Rate was a continuance of certain rates existing at the time of the lease.

The parties consented to state a special case for the opinion of this Court; and that error might be brought on the decision of the Court; and that judgment should be entered for the plaintiff or the defendant, as the case might be, immediately after the decision, and in the meantime all further proceedings, save the argument on the special case, to be stayed.

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The facts stated in the special case were, that the revenue stores and warehouses known as the Dublin Docks are the freehold property of the Crown, which is, in this case, represented by the defendant; and by lease, dated the 15th day of November 1848, the said premises were demised by the Lords Commissioners of Her Majesty's Treasury, with the cranes and machinery upon and belonging thereto, to the plaintiffs, their executors, administrators, and assigns, for a term of twenty-one years from the 29th of September 1848, at the rent of £5,600, payable half-yearly. This lease was to be taken as incorporated with the case, as if this case was a pleading. The lease recited (*inter alia*):—"The said John Scovell, H. Scovell, and G. Scovell were, at said lettings by public auction, which took place respectively in the long room of the Custom House, in the city of Dublin, on the 22nd day of July 1841, and the 25th day of January 1843, declared the bidders of the highest amount of rent for a lease of the premises hereinafter more particularly described, which said premises were divided into two lots, and known as the Custom House Revenue Stores adjoining and within the walls of the Docks at Dublin aforesaid, and denoted by the words 'Lot 1, Lot 2,' on a certain plan then referred to, and subject to the printed particulars and conditions of letting then and there exhibited, and in pursuance of such biddings, and of the agreement signed at such public lettings, by the said H. Scovell, on behalf of himself and his said co-partners, were put into possession of the said premises, *and are now in the occupation thereof*." Immediately after the *reddendum* came this proviso:—"Provided always, and it is hereby declared and agreed, by and between the said parties hereto, and these presents are upon the express condition that the said John Scovell, Henry Scovell, and George Scovell" (meaning the said Henry Scovell

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deceased and the plaintiffs), "their executors, administrators, and assigns, are not to be liable for, or to pay any rates or taxes whatever, *charged or chargeable* upon the said demised premises, or any part thereof, save and except their legal proportion of the "poor-rate." All rates and taxes were paid by the defendant, until he refused to pay this sum of £220 to the Collector-General of Rates for the city of Dublin, under the Dublin Corporation Waterworks Act 1861 (24 & 25 *Vic.*, Loc. and Per., c. 172). This sum of £220 was the amount of the domestic water rate imposed by that Act; and the defendant based his refusal to pay it (when the plaintiffs, as was their custom, referred to him the Collector-General of Rates), on the ground that the rates mentioned in the lease were those *then* (*viz.*, at its date) in existence, and *then* chargeable, and that the lease did not apply to rates the levying of which should be authorised by any Act passed subsequently to the date of the lease.

The plaintiffs claimed exemption, on the ground that the terms of the lease were sufficient to exonerate them, not only from taxes payable out of the premises at the date of the lease (save poor-rate), but from all others to be afterwards charged thereon.

Intending to deduct the sum from the rent, the plaintiffs, on the refusal of the defendant, paid the sum of £220 to the Collector-General of Rates; but the defendant refused to allow the deduction. The plaintiffs then brought this action. No person whatever sleeps or resides on the demised premises, or any part thereof; but the plaintiffs have an office there for the management during the day of their business.

The questions for the opinion of the Court were:—First, whether the plaintiffs *are occupiers* of the premises, in the case mentioned and referred to, within the Dublin Corporation Waterworks Act 1861?

Second—Whether the word "houses," in the said Act, has reference to premises such as those in the preceding case mentioned?

Third—Whether the plaintiffs are liable to be rated and assessed to the domestic water rate under and by virtue of the said Act?

Fourth—Whether the plaintiffs are, upon the true construction of the said lease, entitled to deduct or be allowed, out of the next gale of rent payable by them, the amount heretofore paid by them in respect of the said water rate, and so from time to time, out of future gales, such sums as they shall or may hereafter pay in respect of future assessments of such rate?

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Fifth—Whether the proviso in that regard in the lease referred to by the foregoing case, exempting the lessees from the liability to rates and taxes charged or chargeable on the premises thereby demised, applies, not alone to all rates and taxes at the time of the execution of the said lease, but to all or any such to be afterwards imposed by authority of Parliament, upon them, either as owners or occupiers?

Jellott, for the plaintiffs, opened the argument on the special case.

The whole question is,—what is the true construction of the proviso that the lessees, their executors, &c., “are not to be liable for or to pay any rates or taxes whatever *charged or chargeable* upon the said demised premises or any part thereof, *save and except their legal proportion* of the poor-rates.”—[LEFROY, C. J. Do you mean to argue that that proviso exempts the lessees from liability to pay any rates or taxes thereafter imposed?]
 Yes; the plaintiff's contend that they are exempted, not only from such rates or taxes as constitute a specific charge on the land itself, as tithes, but also from all rates or taxes which are charged on the occupier *in respect of his occupation*; and that the exemption includes as well those rates and taxes which might come into force or be imposed after the execution of the lease, as those which were then in existence. The exception of the poor-rate may be used as an aid to discover what is the nature of the thing out of which it is excepted: *Listowel v. Gibbings* (a). The exemption, qualified by the exception, shows that the lessees were not at any time during the continuance of the demise to pay any rate or tax whatsoever, save what is mentioned in the exception itself. *Hurst v. Hurst* (b)

(a) 9 Ir. Com. Law Rep. 223.
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(b) 4 Exch. Rep. 571.
 41 L

T. T. 1863. shows the meaning of the words "charged on the demised premises." That case was reviewed in *Palmer v. Power* (a). The effect of the 24 & 25 Vic. (Loc. & Per.), c. 172, ss. 55, 65 and 66, SCOVELL v. GARDINER. and of the 12 & 13 Vic., c. 104, which was fully discussed in *Palmer v. Power*, is to show that the domestic water rate and the poor-rate are taxes of precisely the same quality and character. The 53rd and 55th sections of the Dublin Corporation Waterworks Act, 1861, show that the domestic water rate was to be merely a substitute for pre-existing taxes, and that the Act merely substituted a different supply of water from a new source, the rates to be payable exactly as before. The old Acts recited therein all contained provisions for levying the rate off the *occupiers*. With reference to the position of the proviso between the *reddendum* and the covenant to pay the rent, it is to be observed that it is conterminous with the duration of the lease. The word "charged" means *then actually* payable out of the premises, while "chargeable" refers to future taxes and rates of whatever nature which the tenants would be liable to pay in respect of their occupation: *Brewster v. Kitchen* (b); *Giles v. Hooper* (c).

Jebb (with him *Macdonogh* and *Brooke*), for the defendant.

The poor-rate, like the church rate—*Jeffreys' case* (d)—is a tax of a mixed nature, as it may be charged on the realty if the party who is liable to it absconds. Otherwise it is a personal tax on the occupier, not a tax on the premises: *Palmer v. Power*; *Lally v. Concannon* (e); *In re Robins* (f); and so is the domestic water rate. The effect of the exception on the construction of the proviso is shown by *Smithett v. Blythe* (g). Its insertion makes no difference in this case, because at the date of the lease it had not been decided that the poor rate was a personal tax raised by the 1 & 2 Vic. c. 56, s. 78. The remedy given for the recovery of the domestic water rate is a purely personal remedy, as appears

(a) 4 Ir. Com. Law. Rep. 191.

(b) 1 Lord Ray. 317.

(c) Carth. 135.

(d) 5 Co. 67.

(e) 3 Ir. Com. Law Rep. 557.

(f) 4 Ir. Jur. 145.

(g) 1 B. & Ad. 509.

from the 66th section of the Act, and from the 12 & 13 *Vic.*, c. 91, s. 70, and schedule C. No such remedy was given in the Poor-rate Act, so that if the poor-rate is a personal tax, the domestic water rate must be so *a fortiori*. The doctrine of *Listowel v. Gibbings* only applies when the deed is ambiguous. But, the domestic water rate being clearly a personal tax, it is not necessary to have recourse to the words of the exception to ascertain the meaning of the parties. The case of *Hurst v. Hurst* is to be distinguished from the present, because the Court was there coerced by necessity to give to the words a secondary meaning, the primary meaning being impossible.

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The construction adopted in *Brewster v. Kitchen* and *Giles v. Hooper* was unavoidable, because in those cases the exception was of taxes *generally*. That is not so here. The word "chargeable" must be interpreted like words of a similar termination, such as "capable," "payable," which refer to the present time. "Chargeable" means "capable of being made a charge," and has no future signification. The word does not occur in Johnson's Dictionary; but in Richardson's Dictionary this passage is quoted from Burke's Speech on the debts of the Nabob of Arcot:—"Of this interest £383,200 a-year stood *chargeable* on the public revenues of the Carnatic." (*Burke's Works*, ed. 1792, vol. 2, p. 444.)—[HAYES, J. According to that passage, there is no difference at all between the words "charged" and "chargeable."]—The word "charged" means actually an existing charge; whereas, "chargeable" means capable of being made a charge under an authority *then existing*, though not yet exercised: *The King v. St. Luke's Hospital* (a). But "chargeable" has not a future signification in the sense of including rates or taxes to be imposed thereafter by virtue of a statute not yet passed or even contemplated. In *Watson v. Atkins* (b) "chargeable" was used in contradistinction to "fresh taxes." Personal charges are not within the proviso: *Theed v. Starkie* (c): *Platt on Covenants*, p. 222, note b. An exception in a deed is not to be used in *every* case to show the nature of the thing excepted;

(a) 2 Burr. Rep. 1064.

(b) 3 B. & Ald. 347.

(c) 8 Mod. 314.

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but only when the exception is of some part of the thing granted, as of one acre out of any given number demised by the lease. But in this case the exception cannot affect the construction of the proviso, because it is not an exception out of the subject-matter of the demise: *Case v. Stephens* (a); *Platt on Coven.*, p. 223. The period at which the lease was executed, and the nature of then existing taxes *ejusdem generis* with the domestic water rate, are important matters for consideration: 4 *Byth. Conv.* (ed. 1840), *tit. Leases*, pp. 418-19: for the words of an instrument are to be construed as used in the sense which they bore when the instrument was executed, and not in that which they afterwards attained. There is no hardship in holding that the lessees are bound to pay the domestic water rate, because they have the benefit of the water. The occupier for the time being is to pay it, because he gets a full equivalent for his money; and it cannot be supposed that a landlord covenanted to free the lessees from taxes which did not exist at the time when he entered into the covenant, there having been in existence at that time taxes—the police rate, the wide street rate, the paving and lighting rate—which answer the description in the proviso. A deed is no longer to be construed most favourably to the grantee, but its language is to be deemed that of all parties equally.

Brewster, in reply.

No modification, by statute or otherwise, of an existing tax can make it a newly created tax. A water rate had been for upwards of a century, and was then in existence, when the Crown, having a property exempt by law while in its possession from all taxes, agreed to lease it to a subject who, the moment he became lessee, would be liable in respect of it to taxes. The parties to the lease, knowing this, and that the amount of taxes was considerable, arranged that the Crown should pay all of them, *except* the tenant's proportion of the poor-rate, though the Crown, the landlord, might lawfully have undertaken to pay the whole of the poor-rate. The parties therefore contemplated, not merely such rates and taxes as

(a) Fitzgibbon's Rep. 297.

were strictly "charges" on land, but also those which are chargeable on the occupier *for or in respect of land*. In other words, the lessees were to pay nothing except the stipulated rent and their legal proportion of the poor-rate. The exception of the poor-rate shows that the parties introduced the proviso in order to exempt the lessees from—not as the defendant contends "charges" on the land, there being no such "charges" on Crown property, but—charges *in the nature of the thing excepted*, namely, charges upon the lessees personally in respect of their occupation. The language of the Dublin Corporation Waterworks Act, 1861, ss. 2, 33, 53, 55 and 64, shows that the domestic water rate is imposed in reference to the buildings, not in respect to the occupiers. In *Hurst v. Hurst* (a) the tenant sought to relieve himself from a liability which he had undertaken, and the Court decided according to what they thought was the *intention* of the parties, that the tenant was to pay some taxes, and that the Court must put a reasonable construction on the contract. So, the intent of the parties in the present case was that, with the single exception of the poor-rate, the landlord was to pay every rate or tax which, during the continuance of the lease, might be imposed on the tenant, whether in respect of the land, or as a "charge," technically speaking, on the land. The same principle was laid down in *Hopwood v. Barfoot* (b).

The words "charged or chargeable" meant all rates or taxes in respect of the demised premises for which the tenants would be actually liable on becoming tenant, or for which he might as such become liable during the continuance of the term. In *Watson v. Atkins* (c), Holroyd, J., showed that "charged" and "chargeable" are not identical in meaning. These words occur in *Waller v. Andrews* (d), which case supports the plaintiff's view, that the lessees were to be exonerated from every rate or tax which should be charged or become chargeable on the premises in respect of the tenancy, except the legal proportion of the poor-rate. Such was the nature of the contract; and the proviso being one in favour of

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(a) 4 Exch. 571.

(b) 11 Mod. 238.

(c) 3 B. & Ald. 357.

(d) 3 M. & W. 312.

T. T. 1863. the lessees, they are not liable for any charge either on the land,
Queen's Bench or on the occupiers in respect of the land.

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June 11.

On a subsequent day, the Court intimated a wish to have the case re-argued with reference to two points on which mistaken assumptions had been made, and which formed part of the basis of the former argument. The first was a mistake of fact—namely, that at the date of the lease of the 13th of November 1848, the premises then demised were in the hands of the Crown, and therefore exempt from taxes and rates.

The second was a mistake in law—namely, that the premises, even though in the hands of a subject, were liable to the pipe-water rate, for that rate was leviable off dwelling-houses only, and not off buildings of the character of those demised by the lease of 1848. Accordingly, on the 11th of June,

Macdonogh (with him *Brooke* and *Jebb*) maintained, on the first point, that the whole of the former argument for the plaintiffs, so far as it was based on the assumption that the premises were, at the date of the lease of 1848, exempt from taxes and rates, was fallacious.

As to the second point, Counsel contended that the domestic water rate is not a statutable modification of or substitute for the pipe-water rate, which was imposed on dwelling-houses only, as appears from the language of the statutes imposing or dealing with it: 15 & 16 G. 3 (*Ir., Loc. & Per.*), c. 24; 19 & 20 G. 3 (*Ir., Loc. & Per.*), c. 13; 28 G. 3 (*Ir., Loc. & Per.*), c. 50; 49 G. 3 (*Ir. Loc. & Per.*), c. 80; 42 G. 3 (*Ir., Loc. & Per.*), c. 92; * 5 & 6 Vic. (*Loc. & Per.*), c. 102; and the 8 & 9 Vic. (*Loc. & Per.*), c. 193. Therefore, the premises demised by the lease of 1848 never were subject to the pipe-water rate, either as a charge on the premises themselves, or on the occupier in respect of his occu-

* For these Local and Personal Acts, see the collection entitled "The Leinster Acts."

pation of the premises. Therefore, the lessees, when contracting with the Crown, had not in their contemplation a tax in the nature of the domestic water rate; for no tax of that character was then in existence or known to the law as a charge on premises such as those demised, or on their occupiers in respect of them. That it is important to consider the nature of the taxes existing at the time when the lease was executed, appears from the judgment of Powell, J., in *Hopwood v. Barefoot (a)*, and from *Brewster v. Kitchen (b)*; and so, the lessees, unless they had in 1848 the "spirit of prophecy," could not have divined that in 1861 an Act would be passed to enable the Corporation of Dublin to impose an extraordinary tax, called "the domestic water rate," which should be in character unlike any pre-existing tax to which the demised premises were then subject. This tax therefore was not within the contemplation of the parties when they entered into the contract, which uses no words exempting the lessees from taxes to be thereafter created.

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Jellett, for the plaintiffs.

The only difference between the parties is with respect to the mode of applying to the facts of this case certain admitted principles of law. The plaintiffs have never pushed their argument beyond this point—that in 1848 there existed a tax of the same quality and character as the domestic water rate, though not affecting the very premises then demised to the defendants; and that that tax may fairly be considered as having been then within the purview of the parties to the lease. The authorities which support that proposition are collected in 4 *Jarman's Conv.*, by *Byth*. (ed. of 1840), p. 418. The test used in *Hopwood v. Barefoot* and *Brewster v. Kitchen* was, whether a tax of a particular character and nature was known and in existence at the time when the instrument was executed, and *could* have been in the contemplation of the parties when making their arrangements. Counsel then argued, from the Acts already cited, that the pipe-water rate was in all respects a tax of exactly the same character as the

(a) 11 Mod. 239.

(b) 1 Lord Ray. 317.

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domestic water rate, which, however, embraces a greater extent of property. The pipe-water rate, though recoverable only by a personal remedy, was nevertheless, as appears from those Acts, a charge *on the premises*, though not in the same way as other charges, such as tithes, were. The pipe-water rate operated the *occupier*, and therefore, as between landlord and tenant, was chargeable on the premises, and included under the word "charged:" *Hurst v. Hurst (a)*. Everybody must be deemed to contract within the variations of legislation which occur from time to time.

On the first point this observation is to be made—that on the present record the Court must *assume* that at the date of the lease in 1848 the demised premises were in the hands of the lessor; otherwise a right to make the lease would not have existed. The execution of a lease affirms that the lessor has at that time a right to make the lease. A previous outstanding letting is put an end to by the grant and acceptance of a new lease: *Lyon v. Reid (b)*.

Cur. ad. vult.

LEFROY, C. J.

June 27.

In this case the plaintiffs are the lessees of the Custom House Docks and premises, and the defendant represents the Crown. It is a special case, which has been agreed upon between the parties, and stated for the opinion of the Court. In form it was an action brought for the recovery of a debt; and the question arises between the lessees and the lessor, whether the lessees, the plaintiffs, are entitled to a deduction, from the rent reserved by the lease, of the amount of the domestic water rate, which they insist that they are, by the proviso in the lease, entitled to deduct from the rent? The answer to the question depends upon the construction of the proviso, and of the recitals which preceded it, and which, as it appears to us, have put on it a construction which induces us to decide that the plaintiffs are entitled to make the deduction, upon their right to make which they insist. I shall now state that portion of the lease to which it is important, for the purposes of our decision, to refer.

The lease bears date on the 13th of November 1848; and, after

(a) 4 Exch. 571.

(b) 13 M. & W. 285.

stating the parties to it, and reciting certain Acts of Parliament, further recites that:—"Whereas the said John Scovell, H. Scovell, and G. Scovell, were, at two lettings by public auction, which took place respectively in the long room of the Custom House, in the city of Dublin, on the 22nd day of July 1841, and the 25th day of January 1843, declared the bidders of the highest amount of rent for a lease of the premises hereinafter more particularly described; which said premises were divided into two lots, and known as the Custom House Revenue Stores, adjoining and within the walls of the Docks at Dublin aforesaid, and denoted by the words 'Lot 1, Lot 2,' on a certain plan then referred to, and subject to the printed particulars and conditions of letting then and there exhibited; and in pursuance of such biddings, and of the agreement signed at such public lettings by the said H. Scovell, on behalf of himself and his said co-partners, were put into possession of the said premises, and *are now* in the occupation thereof. And whereas the said J. Scovell, &c., having considered that they had grounds to be dissatisfied with the large amount of the said declared highest biddings, which was the sum of £4350, for that portion of the said premises called 'Lot 1,' and £2800 for that portion thereof called 'Lot 2,' did make an application to the said Lords Commissioners of her Majesty's Treasury, praying that they, the said J. Scovell, &c., might, for the reasons stated by them, be allowed to retain the occupancy of the said premises, at a much lower rent than what they had bid for the same: and the said J. Scovell, &c., did cause a notice to be given to the said Commissioners of the Customs and their secretary, of their intention to surrender the said premises on the 29th day of September 1848, in the event of their said application not being complied with."

From these recitals it is quite evident that, whatever was the nature of the agreement to which reference is made therein as having been signed by H. Scovell, on behalf of himself and his co-partners, there was *an* agreement at the time, made on certain terms then agreed upon; and that, whatever that agreement was in other respects, it contained a power to surrender the premises

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on the tenants giving a certain notice of their intention so to do. For. they now specify that they had given such a notice, and followed it up by saying that they would persevere in making the surrender, unless their previous proposition to hold the premises at a much lower rent was accepted. Then, what follows in the lease? This recital:—"And whereas a letter was received by the "said last-mentioned Commissioners from Sir Charles Trevelyan, "one of the secretaries to the said Lords Commissioners, dated the "11th day of September 1848, stating that their Lordships were "pleased to sanction the said Commissioners of Customs entering "into a negotiation with the said J. Scovell, &c., for a lease to them "of the said premises, for a term of seven, fourteen, or twenty-one "years, at a yearly rent of £5600. That a sum of £3500 should "be allowed out of the rent due from them in respect of certain "improvements alleged to have been made upon the said premises; "and that a portion of the said premises known as the West Stores "should have the necessary repairs to the roof, for the purpose of "strengthening the same, at the expense of the Crown, at an estimated sum of £270. And the said Commissioners of Customs "having communicated the contents of such letter to the said "J. Scovell, &c., they have, in answer thereto, signified their readiness to accept the terms mentioned in the said letter, and did, in "pursuance thereof, sign a memorandum of agreement of the terms, "stipulations, and covenants that should be contained in such "lease."

In short, the account of what took place is this:—The tenants, having a power to surrender the premises, and complaining of the excessive rent which had been reserved, communicated their complaint to the Lords Commissioners of the Treasury, along with a notice that, unless relief was given to them, they would surrender the premises. But what they sought was to retain the *occupancy* of the premises, which would have enabled them still, from time to time, to surrender the premises, if they thought fit to do so. What was the answer given to that proposal? The Lords Commissioners of the Treasury answered thus:—"If you will take a lease of the "premises, and bind yourselves, not for the mere occupancy of the

"premises, which would enable you to surrender them at any time, "if you found it a hardship to pay the rent; but, by a lease for a "certain term of years, we will let you have a lease, at such and "such a rent, subject, however, to the several terms, stipulations, "and covenants herein contained." After the last recital which I have read, the case proceeds to witness that, "In pursuance of such "agreement, and in consideration of the rent hereby reserved and "made payable, *and of the covenants, clauses, and agreements "herein contained*, and which, by and on the part and behalf of the "said, &c., their executors, &c., are and ought to be paid," &c., the premises therein specified are demised to the present lessees, their executors, &c., "To have and to hold all and singular the said "stores and premises hereby demised, and intended so to be, with "the cranes and machinery upon and belonging to the same, as also "the full and free use of the said quays and wharfs, and of the "cranes and machinery thereon, for the purposes aforesaid, unto," &c., "from the 29th day of September 1848, for and during and "unto the full end and term of twenty-one years, from thence next "ensuing, and fully to be completed and ended; determinable never- "theless, as hereinafter is mentioned, by the said J. Scovell," &c. The lease then proceeds to reserve the rent of £5600 per annum; and after the reservation of the rent follows this proviso:—"Pro- "vided always, and it is hereby declared and agreed, by and "between the said parties hereto, *and these presents are upon this "express condition*, that the said J. Scovell, &c., *are not to be "liable for or to pay any rates or taxes whatever*, charged or "chargeable upon the said demised premises, or any part thereof, "save and except their legal proportion of the poor's rates."

Now, if words can express the meaning of parties so as to put a matter beyond a doubt, it does appear to me that these words do put beyond the possibility of a doubt the right of the tenants to be exempted from the payment of any rates or taxes which, during the whole term granted by that lease—for the proviso includes, not only the tenants themselves, but also their executors, &c.—should be payable out of the premises. I do not know how parties could contrive more certain language to guard and secure

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the tenants from liability; or what these words mean, if they do not mean that, during the whole continuance of the demise, the tenants and their representatives are to be exempt from the payment of all taxes and rates, with one specific exception; and indeed the very circumstance that one exception was made is decisive as to the construction of the proviso; for "*expressio unius est exclusio alterius*." The general rule of law is, that one exception out of the subject-matter of the contract shows that everything else is expressly included. There is, too, another rule of law, that where there are several words, and you can give to each of them, according to the subject-matter of the contract, a distinct meaning, you are not to suppose that any two of the words are identical, or were used in an identical sense, but you must give to every word its separate effect. Here, it is perfectly clear that the words "charged or chargeable," which, in their natural sense and properly, provide for an exemption of the tenants from rates and taxes during the whole continuance of the term granted by the lease, do, in their proper acceptation, mean that nothing which is now (at the date of the lease) charged, or which shall hereafter become chargeable on the demised premises, or on any part of them, shall be paid by the tenants who, during the continuance of the demise, shall be exempt from everything now charged on the premises, or on any part thereof, as well as from any liability to be charged with rates or taxes during that period. And how natural was that stipulation. The tenants had entered into an agreement for what proved formerly to be too high a rent. But it is evident that in that agreement there was a clause giving the tenants power to surrender the premises. Accordingly, they gave to the Lords Commissioners of the Treasury a notice of their intention to surrender the premises, and said:—"If you do not reduce the rent we will surrender the premises." The Crown then insisted upon their taking a lease, by which they would be bound for a certain number of years to pay the rent agreed upon, and so put an end to all future applications for a reduction of the rent. The present lessees agreed to take that lease, covenanting to pay the rent, subject, however, on the other hand, to an exemption of this nature—that they were not to be chargeable,

during the whole or any part of the term granted, with any rates or taxes then charged or thereafter to be chargeable on the demised premises, or any part thereof, save only "their legal proportion of the poor's rates." When the application was made to the Lords of the Treasury they directed the Commissioners of the Customs to enter into a negotiation with the tenants. That negotiation was, accordingly, entered into; and we have in the lease the recitals which show that, upon the occasion of that negotiation, the Messrs. Scovell agreed to take a lease, upon the terms of paying such and such a rent, and subject to the "several covenants, clauses, and agreements herein contained. To the fulfilment of this part of the consideration the lessees are entitled, as much as the lessors are entitled to the rent, and to the security for it. Then what is the fact accompanying this lease? We find that, ever since the execution of it, the lessees, whenever they were served by the Collector-General of Rates and Taxes in the city of Dublin with a demand for rates or taxes, took or sent it to the Custom House, where the rates or taxes were always paid, from that time down to the present day, by the persons, whoever they were, who received the rent from the plaintiffs. You are not indeed to make or to vary a contract by matters *dehors*. But when you find that the contract has in itself words which import that which is now stated to have been in fact the way in which it has been followed up, it is perfectly legitimate to—and the cases decide that you may—eke out the terms of a contract by matters of fact of that nature. And I remember a most remarkable case before Lord Mansfield, C. J., which went to the House of Lords, where the question was, whether a lease for lives was renewable for ever? The House of Lords decided that, if there were any words, no matter how general they might be, which imported perpetuity, that would not suffice to turn the lease for lives into a perpetuity, although there was a usage of renewals. They held sacred the principle that you cannot make a contract by usage. You must abide by the existing contract. But, if the terms of the lease have a degree of vagueness, they might be, it was decided, interpreted by the way

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and course of acting. In the present case then we have before us the way in which this contract in the proviso has been acted upon. And therefore I, for myself at least—and I believe that my Brothers agree with me—do not think that it requires any authority at all to decide upon the construction which we ought to put upon this proviso. Each particular case indeed is a great deal better decided by the application of its own language, together with the circumstances under which the contract was made; which circumstances may be adverted to. We may look at the circumstances which pre-existed the making of the contract, and existed at the making of it, for assistance, in respect to the construction which should be given to the words, in case of such ambiguity as would admit of another construction being put upon them.

For these reasons, and without entertaining a shadow of doubt as to the true construction of this proviso in the lease, I am of opinion that our judgment should be given for the plaintiffs.

O'BRIEN, J.

I am also of opinion that our judgment should be for the plaintiffs. The case depends upon the construction and effect of the proviso in the lease of November 1848, that "the lessees, their executors, administrators or assigns *are not to be liable* for, or to "pay any rates or taxes whatever, *charged or chargeable* upon the "said demised premises, or any part thereof, *save and except their "proportion of the poor-rates."* A person not aware of the various distinctions raised at law as to the meaning of words might, from this proviso, reasonably infer the intention of the parties to have been, that no rates or taxes whatever, present or future, to which the lessees might otherwise be liable, or at any time become liable in respect of the premises, should be paid by them, except their proportion of the poor-rate. Defendant's Counsel, however, contend that, notwithstanding this proviso, plaintiffs are liable (as between them and the lessors) to the domestic water rate, under the Dublin Waterworks Act of 1861; and they seek to establish this liability upon two grounds:—First; that, even if the Act had

been passed before the date of the lease, yet the domestic water rate would not have come within the description in this proviso, of "*rates or taxes charged or chargeable upon the premises*;" and, secondly, that, even assuming it would in such case have come within the proviso, yet that, as the Act was not passed until after the lease, the rate is to be considered as a new rate, and therefore not within the proviso.

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With respect to the first ground, I think it clear (as contended for by defendant's Counsel), that, according to the strict construction of the terms, the water rate is not to be considered as a charge upon the premises, but is more properly to be considered as a charge upon the occupier in respect of his occupation of the premises; but it by no means follows from this, that according to the true intent and meaning of the entire proviso, we should not put such a construction upon the words "*all rates or taxes*," &c., as would include the water rate. The case of *Hurst v. Hurst* (a) (relied on by plaintiff's Counsel) is an authority on the point. In that case the lease contained a covenant by the lessee to pay "all taxes, charges, rates, and as then were or should at any time thereafter during the demise, be taxed, charged, assessed, or imposed upon the demised premises, or any part thereof (except the land tax and property tax.)" And one question was, whether, under that covenant, the lessee was liable for the non-payment of church rate, highway rate, or poor-rate? The lessee's liability was disputed on the ground that those rates were not assessed on the premises, but on the occupier in respect of his occupation; but the Court held, that, under the covenant, the lessee was liable for their non-payment. By referring to the judgment of the Court, delivered by Baron Parke, it will be seen that the ground of their decision was, that although the words of the covenant were not in their strict sense applicable to those rates (as such rates were imposed not on the land itself, but on the occupier in respect of his occupation), yet, that there was "*a secondary sense*" in which the words of the covenant might be applied to them. And that, as the covenant could not be construed as a covenant merely to pay such taxes as

(a) 4 Exch. 571.

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(a) 3 Ir. Com. Law Rep. 557.

(b) 4 Ir. Com. Law Rep. 191.

And I think we are further warranted in putting that construction upon them by reference to the language used in some of the previous pipe-water or water rate statutes of which Mr. *Jellett* has given us so clear a summary. That previous water rate, like the present, was only a charge on the occupier in respect of his occupation, but was not, strictly speaking, any charge on the premises themselves. And yet, in some of the provisions of those statutes, terms are used which would imply that it was a charge on the premises themselves; showing that those terms were used by the Legislature, not in their strict and technical sense, but in their "*secondary*" or popular sense. Thus, by the 42 G. 3, c. 92 (Loc. & Per.), after making the owners and occupiers of dwelling-houses liable to certain water rates, it was provided in the sixth section, that nothing in the Act should be construed to extend, "*so as to charge with the said rates*" the Castle of Dublin, or any house therein, or the residence of the Lord Lieutenant, Chief or Under Secretary. And it was provided, by the seventh section, that nothing in the Act should be construed to extend "*so as to charge with or subject* any hospital, charity school, or poorhouse, &c., *to the payment* of said rates." Again, by the 49 G. 3, c. 80 (Loc. & Per.), after empowering the Corporation to demand from the owners or occupiers of dwelling-houses certain rates, over and above all rates then payable for supply of pipe water, and to be calculated according to the amount of ministers' money, it was provided in the second section, that if the ministers' money was not ascertained, that then every such house *should* "*be chargeable with,*" and the owners or occupiers pay, such several rates, in proportion to the amount at which the houses should be rated in the workhouse books. And it was further provided by the third section, that if any houses were not valued for ministers' money, or workhouse money, then that there should be such a valuation thereof as therein directed; and that after such valuation the Corporation might "*rate, charge and assess every such dwelling-house with such rates as aforesaid,*" in like manner as if they had paid ministers' money; and should receive and recover the same from the owners

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or occupiers thereof. Though these statutes are no longer in force, they show in what terms the then existing water rate was referred to and described. And we find that in the provisions I have mentioned, the Legislature referred to it as being "*charged upon the houses*," although in strictness it was only made a charge upon the owners or occupiers of the houses in respect of their occupation. A similar phraseology is adopted in the 53rd section of the general Act for the collection of rates in the city of Dublin (12 & 13 Vic., c. 91, and passed since the date of the lease), which required a rental to be made out of "*all houses, tenements and premises*" which, under the previous Pipe-water Acts, "*might be chargeable with said rate*." Having regard therefore to the fact that in those several statutes words similar to those in the proviso now before us were used by the Legislature with reference to the water rate, there is the less difficulty in our holding that the words in the proviso are applicable to, and would include, the water rate, when, from the instrument itself, it appears that the parties used those words under the impression that they would include rates of a similar character. It is also to be observed, that if the description in the proviso does not bear that construction, there would be nothing on which the proviso could operate, as it does not appear that there was at the date of the lease any rate or tax that was properly a charge on the premises, or that would come within that description if construed in its strict sense. All the rates and taxes which were mentioned during the argument, as existing at the date of the lease, were (like the water rate and poor-rate) charges on the occupier in respect of the premises, and not strictly charges on the premises themselves. In fact, as the premises were the property of the Crown, no rate or tax whatever was a charge on them in the strict and primary sense of the word "*charge*." And while they remained in the occupation of the Crown, no rate or tax would have been chargeable in respect of such occupation. It was only when they came into the occupation of the lessees or tenants of the Crown that any rates or taxes would become "*charges*" (in the secondary sense of that word) in respect of the occupation. I am, therefore, of opinion that the present

water rate, if it existed at the date of the lease, would have been included in the proviso exempting the lessees from payment of rates and taxes.

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The second question in the case is, whether the present water rate, having been created by the Waterworks Act of 1861, passed subsequent to the lease, is therefore to be considered as a new rate; and as excluded from the proviso, on the ground that the proviso only applied to the then existing rates and taxes? It is true that the present water rate differs from the previous pipe-water rate, both in amount and otherwise; but still it is in many respects a tax of the same character. Both were imposed for the purpose of providing water for the city of Dublin; the preamble of the Act of 1861 recites the Royal Commissioners' report, that the then existing supply of water was bad, and that there was need of an improved supply; and the object of the Act was to give such supply. It recites the previous pipe-water statutes, and deals with the same subject-matter; and the 53rd section expressly provides, that the previous water rate should continue to be apportioned, levied and paid as theretofore, until the new rates authorised by that Act should become payable. It appears to me, therefore, that we should not decide on the effect of the proviso with regard to the present water rate, as if we were dealing with a perfectly new rate imposed for the first time after the execution of the leases; but that we should consider it as having been imposed in lieu of, and substituted for, a previous rate of the same nature and character. It is also to be observed, that the language of the proviso itself would imply something more than a mere provision as to then existing rates and taxes. It uses the word "*chargeable*" in addition to the word "*charged*," and refers to the future liability of the lessees.

I am, therefore, of opinion that, in accordance with the principle decided in *Brewster v. Kitchin*, or *Kidgill (a)*, we should hold that the proviso in the lease now before us extends to the present water rate, and entitles plaintiffs to exemption from its payment.

(a) 1 Lord Ray. 317; S. C., 12 Mod. 167.

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I am of opinion that, according to the true construction of the lease of the 13th of November 1848, the plaintiffs are not liable to the payment of the domestic water rate; and that if they shall pay it, they are entitled to deduct the amount so paid from the rent reserved. I collect from the recitals in the lease, that the plaintiffs were, at its date, in occupation of the premises as tenants; that they had found the rent and other outgoings (being upwards of £7000 per annum) too large; and that, accordingly, they proposed to hold at a smaller rent, intimating that if this proposal should be rejected, they would surrender the premises. Accordingly a new contract was entered into, as evidenced by the lease now before us, by which the premises were demised to the plaintiffs for twenty-one years, at a rent of £5600 per annum; and then comes the proviso in question.—[Read it.]—This clause was evidently introduced at the instance, and for the benefit, of the tenants, and to secure their exemption from certain burdens to which it was foreseen they would otherwise be liable during the lease. Accordingly, the proviso declares that the tenants “are not to be liable for, or to pay”—evidently looking to the future; and the only assignable limit of that future is the continuance of the lease. For what are they not to be liable? “Any rates or taxes whatever.” If the clause had stopped there, I think, as between these parties, the tenants would have been exempt from the domestic water rate. For though the statute which authorised that rate was passed since the making of the lease, yet it was for a purpose which had been for upwards of a century within the contemplation of the Legislature—viz., the due supply of the citizens of Dublin with water. During that time many statutes had been passed and repealed, the Legislature still having the same primary object in view—a due supply of water for the several purposes for which it might be required; while the mode of paying the expenses and levying the necessary impost for the purpose always formed the secondary, though still most important, consideration in those Acts. I take it, therefore, that it was plainly within the contemplation of the parties to this lease to

make provision for this, as well as the other imposts which existed within the city of Dublin. And that, judging of the future from the past, they might, without being imbued with any spirit of prophecy, have calculated on it as not improbable that the supply of water to the citizens might thereafter be regulated by some new statute, by which some new provision might also be made as to the mode of levying the expenses incidental to the improved works that might thereafter be undertaken or carried on; and such is the new Waterworks Act. It is *in pari materia* with the former Pipe-water Acts, and the domestic water rate is (section 55) expressly enacted to be in lieu of the pipe-water rates theretofore levied. But it has been contended that, from the closing words of the proviso, it was not the intention of the parties to include such a rate as the domestic water rate, but only those rates "charged or chargeable upon the said demised premises, or any part thereof." And it is said that the domestic water rate is not a charge on the premises, but only on the occupier in respect of the premises. Be it so. But I think it pretty clear that the parties never intended to use the words in that very strict and technical sense; and that they meant to include rates, whether charged on the premises, or on persons in respect of the premises. This is made very plain by the exception of the tenants' proportion of poor-rate, which is also a tax on the person in respect of property, and which exception would have been an idle waste of words if the parties had not conceived the previous words sufficient to include them. As an instance that the Legislature itself, in its solemn enactments, has used these terms interchangeably, I may refer to the Pipewater Act, 15 & 16 G. 3, c. 24, ss. 3 and 6, in the former of which the Act speaks of "houses chargeable," and in the latter of "persons chargeable" with the rate. The same thing also occurs in the 19 & 20 G. 3, c. 13, ss. 3 and 6.

In addition to the cases that have been cited at the Bar, and in support of the view I have taken, I may refer to *Rex v. The London Gaslight and Coke Company* (a). There, it appeared that, by an old Act of Parliament (7 G. 3, c. 37) it was enacted, that certain

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(a) 8 B. & Cr. 54.

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lands in the parish of St. Bridget, London, then intended to be inclosed and embanked from the river Thames, should vest in the owner of the adjoining wharf, "free from all taxes and assessments whatsoever." Afterwards, by an Act of the 39 *G.* 3., for the better relief of the poor of the parish of St. Bridget, the church-wardens and overseers were authorised to make a rate upon *all* persons occupying any rateable hereditament within the parish. Accordingly, rates were made from time to time, and were paid by the occupiers of the tenement in question until the year 1825; when, on a higher rate being made, the occupiers objected and claimed a total exemption. On an appeal against the rate, the question of liability was reserved for the King's Bench. It was there contended that it was only the *land* that was to be free from taxes; and that the poor-rate was a tax not on the land, but on the person in respect of the land; and that, at all events, whatever exemption might have been claimed under the 7 *G.* 3., was put an end to by the subsequent Act of the 39 *G.* 3., which authorised an assessment of *all* persons occupying any of the rateable hereditaments mentioned in the Act. The Court, however, held that, having regard to the objects of the two statutes, and to the intentions of the Legislature in passing them, the defendants were entitled to the exemption they claimed.

Taking this case then as an authority, I am of opinion that the parties intended to provide against the lessees being burdened with any taxes, whether those taxes were charged on land or on the person of the tenants in respect of the land—save and except the tenants' proportion of poor-rate; and accordingly I think that our judgment ought to be for the plaintiffs, the tenants.

FITZGERALD, J.

I also concur in the result at which the other Members of the Court have arrived; and probably I should have contented myself with saying so much, if it was not that I would not wish it to be supposed that I also agree in the opinion that the present case is free from doubt and difficulty. On the contrary, from the first moment at which this case was opened

to the Court, I have considered it as a case involving a question of considerable difficulty. I am not now free from doubt as to the correctness of our judgment. As the case may possibly go further, I think it right to state the grounds of my opinion.

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The facts, as stated in the special case, or gathered from the recitals in the lease, appear to be, that the revenue stores, warehouses, and premises known as the Dublin Docks, being the freehold property of the Crown, were let by public auction, in two lots, on the 22nd of July 1841, and 25th of January 1843; and the plaintiffs were declared tenants of Lot 1, at a rent of £4350, and of Lot 2 at a rent of £2800. The plaintiffs were put into possession as tenants at those rents, and continued to be and were in occupation at the time of making the lease of the 13th of November 1848. The plaintiffs, having become dissatisfied with the amount of the rent, made an application to the Lords of the Treasury for a reduction, and served a notice of their intention to surrender on the 29th of September 1848, in the event of their application not being complied with. The Treasury, subsequently, by letter of the 11th of September 1848, agreed to reduce the rent by the annual sum of £1550, and to grant a lease of the premises to the plaintiffs, at the reduced rent of £5600. By lease, dated the 13th of September 1848, the secretary of the Commissioners of Customs, by direction of the Commissioners, and with the approbation of the Treasury, demised the premises in question, with the rates and charges on loading, unloading, and warehousing of goods, to the plaintiffs, to hold from the 29th of September 1848, for twenty-one years, subject to be determined as therein provided, at the rent of £5600.

Immediately upon the reduction of the rent, and between it and the covenant for payment, is interposed the proviso on the construction of which, in connection with the domestic water rate payable under the Dublin Corporation Waterworks Act 1861 (24 & 25 Vic., c. 172, Loc.), the question arises. No controversy appears to have taken place as to any rate or tax having existence at the date of the lease.

Amongst the local rates which existed at the time of making the

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lease was the pipe-water rate, payable under a number of statutes, the principal of which were the 15 & 16 G. 3, c. 24; 19 & 20 G. 3, c. 13; and 8 & 9 Vic., c. 193 (Loc.) The rate was payable to the Corporation for water supplied; but it was chargeable only on the occupiers of dwelling-houses; and it was conceded, during the argument, that it did not extend to the premises in question, and was not in any sense charged or chargeable on the demised premises, or on the occupier in respect of his occupation.

The Dublin Corporation Waterworks Act received the royal assent on the 22nd of July 1861. The general object of the Act was to enable the Corporation to draw an improved supply of water from a distant source, viz., the river Vartry, in the county of Wicklow; and for that purpose large powers are given to the Corporation. The limits of the Act embrace, in addition to the city of Dublin, portions of the county of Dublin and of the county of Wicklow; and a very extensive authority is given to the Corporation to rate persons and property not before liable to any pipe-water rate.

It was conceded that, under the large words of the interpretation section of the Act, taken in connection with the 54th and 55th sections, the plaintiffs, as occupiers of the demised premises, became liable to be rated for, and to pay the domestic water rate; and, accordingly, had been rated, and had been obliged to pay to the Corporation the sum of £220 for one year's domestic water rate.

The question in effect is, whether the plaintiffs are entitled under the terms of the lease to deduct this sum of £220 from their rent?

It was contended, in the first instance, on the part of the defendants, that the provision in the lease exempting the tenant from the payment of rates and taxes applied only to rates and taxes which were technically charged, or capable of being charged on the premises, and that water rate was not in that sense a charge on the premises. A great part of the argument on both sides was applied to this point. I am of opinion that the defendant's contention on this point is not well founded. If such was the view to be taken, the proviso could have no operation whatever, because at the time of making the lease there was no tax or rate which was in the strict sense a charge on the premises. The principal rates and taxes then

in existence in the city of Dublin were grand-jury cess (1 & 2 *Vic.*, c. 51); police-tax (1 *Vic.*, c. 25, and 6 & 7 *W.* 4, c. 29); paving and lighting tax (47 *G.* 3, c. 109, s. 2, *Loc.*); borough rate (3 & 4 *Vic.*, c. 108); poor-rate and pipe-water rate. None of these rates or taxes charged the property of the Crown: *Gibbons v. Moan* (a); *Roe v. Darley* (b); *Lonsdale v. Wilson* (c); *Farquharson v. Richards* (d): but they were all, or some of them, chargeable on the occupiers of Crown property in respect of their occupation. It seems to me that we ought not to adopt a construction which would in effect defeat the operation of the proviso, and that we are bound, if we can consistently with the intention of the parties, "*ut res magis valeat quam pereat*," to interpret it in a larger sense as applicable to rates and taxes, which, though not charged on the land itself, are yet chargeable on the occupier in respect of his occupation.

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The case of *Hurst v. Hurst* (e) is a strong authority for the larger construction. I am fortified too in the opinion I have formed by the exception out of the proviso of the tenant's "*legal proportion of the poor's-rates*." An exception of this nature seems to mark the character of the thing from which it is excepted; and poor-rate is not a charge on land: *Lally v. Concannon* (f).

The defendant further contended that the proviso exempted the tenant only from rates and taxes then existing, or then capable of being charged, and did not apply to taxes created subsequently. The plaintiffs, on the other hand, urged that the proviso was prospective, and embraced new taxes; and, further, that the water rate was not to be regarded as a new tax, but was a substitute for the pipe-water rate, and as such within the meaning of the proviso. In support of the latter allegation the plaintiffs relied strongly on *Brewster v. Kitchen* (g), in which Lord Holt is represented to have observed in his judgment:—"Another reason that influences this case is the time when this rent was granted, viz., 1649, at which

(a) 6 Law Rec., N. S. 141.

(b) 1 H. & Br. 442.

(c) 8 Ir. Law Rep. 412; S. C., in Error, 13 Ir. Law Rep. 438.

(d) 4 Ir. Com. Law Rep. 150.

(e) 4 Exch. 576.

(f) 3 Ir. Com. Law Rep. 557.

(g) 1 Lord Ray. 317.

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 "wars. From 1642 men were taxed by monthly assessments;
 "and there was the same clauses in those Acts for the tenant
 "to deduct as in those of this time. But if the covenant had been
 "made in 1640, it had not extended to these taxes, because then
 "this sort of taxes was not known in the kingdom; and therefore
 "a man cannot be supposed to comprehend them in a covenant
 "without the spirit of prophecy; this way being introduced, it
 "is natural to suppose that the party made provision against them
 "by this covenant."

But Lord Holt is there dealing with a tax which existed at the time of the covenant, leviable out of the same property, from the same persons, in the same proportions, and with the same right to deduct, though under a temporary Act of Parliament. The identity of the tax will be seen more fully by reference to the report of the same case, in the 12th *Mod.*, p. 170, where Lord Holt says:—
 "These two sorts of taxes differ only in form; the nature of the tax
 "is the same; the same things are taxed, and the same clauses of
 "deduction in both." It seems to me that we must consider this water rate, in relation to the demised premises, and in the construction of the proviso, as a new rate, created by a subsequent Act of Parliament, and affecting property not before in any sense chargeable with water rate. The question then remains, whether, on the true construction of the lease, the tenant is exempted from the payment of the water rate, being a new rate payable by the tenant or occupier of the demised premises in respect of his occupation?

It was urged upon us, as a general rule, that a covenant to pay taxes extends only to taxes existing at the time of the covenant, and not to future cases; and for that position we were referred to the note to 4 *Jarman's Conveyancing*, 3rd ed., p. 418, which, so far, is based only on *Davenant v. The Bishop of Salisbury* (a). There was no decision there on the point; but there is a *dictum* of Lord Holt's, "that it were hard to extend it to new charges: and we all know how lately this way of taxes came in." That case, so far as it

(a) Vent. 233.

is an authority on the point, seems to be encountered by *Giles v. Hooper* (a). "The case states lease for years, rendering £80 per annum rent, free and clear from all manner of taxes, charges, and impositions whatsoever. Adjudged (*absente* Holt, C. J.), "that the rendor made a covenant, and that the words above mentioned extend to discharge the lessor from payment of all land taxes lately imposed by Act of Parliament, and long after the commencement of this lease; and that the lessee is bound to pay the whole rent, without any manner of deduction for any old or new charge or imposition whatsoever." *Giles v. Hooper* is to be found in *Carthew* only; but Willes, C. J., when combating a case cited from *Carthew*, says:—"I own that *Carthew* is in general a good and faithful reporter;" and Lord Kenyon expressed a similar opinion in 2 *T. R.*, p. 776. The true rule of interpretation of every written instrument is manifestly that which makes it speak the intention of the parties at the time it was made. And it seems to me that the intention of the parties to the lease of the 13th of November 1848 was, that the lessees were to be kept free from all manner of rates and taxes, except poor-rate, which should at any time during the continuance of the demise be payable by the lessees, in respect of their occupation. I have not arrived at this conclusion without considerable hesitation; but I am fortified in it by the strong and comprehensive language of the proviso itself, which speaks not only for the present, but for the future, and which, after the reservation of the rent during the continuance of the demise, and before the covenant to pay, "during the continuance of this demise," provides that the lessees "*their executors, administrators and assigns, are not to be liable to pay any rates or taxes whatever,*" &c.

The prior recitals in the lease also show the position of the parties at the time, and the true reason and foundation of the contract. The lessees were in occupation before and at the time of the lease as yearly tenants, at a rent which they ascertained to be beyond the value of the occupation. They apply to have the rent reduced. A treaty ensues, which ends in a lease at a

(a) *Carthew*, 135.

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GARDINER. A passage of Lord Holt's judgment in *Brewster v. Kitchin*, at p. 320, 1 *Lord Ray.*, tends to support the view I have taken. Lord Holt there says:—"This covenant extends to all future acts; "for it is, that Ellen and her heirs should be free, which is in "fee; and her assigns of the rent might take advantage of it; "for as the estate was in fee, so the covenant is co-extensive "with the estate, and it is in fee also. And therefore it is as "strong as if it had been to be free from all taxes to be imposed by any Act whatsoever." I should observe that *Brewster v. Kitchin* was adopted by Lord Mansfield in *Bradbury v. Wright (a)*.

For these reasons I concur in the judgment of the Court—repeating, however, that I consider it to be a case of grave difficulty with respect to the question of extending this proviso to a *new* tax, which I consider the domestic water rate to be. The question may again arise in reference to other taxes or rates; such, for instance, as the income tax, which has been created in this country since the date of this lease. In the Income Tax Act the Legislature has taken the distinction between a tax on the land itself, and a tax in respect of the occupation of the land. The owner is liable in respect of the land. Here, the income tax would not in that sense apply, because the land is the property of the Crown. But there is also an income tax which is payable by the occupier. It is measured by the value of the property, and is payable by each individual occupier in respect of the occupation. Would the tenant here be entitled to deduct from his rent the income tax payable in respect of his occupation? Therefore, when the present question is treated as one free from difficulty with respect to the application of the proviso to *future* taxes, I do not agree with that view.

I may also point out a difficulty which arises from the nature of the particular rate in question. The domestic water rate is a rate of a peculiar nature, and not of the character of an ordinary tax. It is a rate for which full value is given and received, and is payable to the Corporation, not as a *tax*, but as the *price* of water

(a) Doug. 624.

which they supply to the individual occupier. That was so under the old Pipe-water Acts; and we cannot read the present Dublin Corporation Waterworks Act, 1861, without seeing that it also rests upon the supposition that every person who pays the domestic water rate may or does receive from the Corporation the full value of the rate, in the water supplied. If then the domestic water rate had existed, at the time when this lease was executed, as a charge payable by the occupier in respect of his occupation, it would have been within this proviso. But how can we affirm that, if a rate of this nature had then been payable by the occupier of these premises in respect of his occupation of them, it would not have been, in like manner as the poor-rate has been, excepted in terms? The domestic water rate is one for which the tenant who pays it gets full value.

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THE QUEEN, at the Prosecution of the CITY OF DUBLIN
STEAM PACKET COMPANY,

v.

WILLIAM PUGH GARDNER, Esq., Collector of Customs and
Registrar of Shipping of the Port of Dublin, and

JOSEPH TAYLOR, Esq., Tide Surveyor for said Port.*

E. T. 1864.
April 16, 18.

MANDAMUS.—In Michaelmas Term (November 16th), 1863, the prosecutor obtained a conditional order for a writ of *mandamus*,

A vessel duly
registered at
D., in Ireland,
pursuant to the
Merchant

Shipping Act, 1854, was in 1862 altered at L., in England, at which port a surveyor, appointed under the said Act, remeasured the ship, and certified his measurement to the registrar at that port. The owners objected to the mode of measurement, and now sought a *mandamus*, directed to the registrar at D., to have the vessel remeasured.

Held, that this Court had no jurisdiction, inasmuch as it is the registrar at the port of alteration, not that at the port of registry, who is required by the Act to measure the alterations.

Quere, by FITZGERALD, J.—Whether the owners could get a *mandamus* to have the vessel registered as a new one?

* Before LEFROY, C. J., and O'BRIEN and FITZGERALD, JJ.†

† When this case was called on for argument, HAYES, J., stated that he was a shareholder in the Dublin Steampacket Company, and retired from the Bench.

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directed to Messrs. Gardner and Taylor, commanding them, or such one of them whose duty it is in that behalf, to *remeasure* the vessel of the said Company, called "The St. Columba," according to the rules prescribed by the 23rd section of the Merchant Shipping Act, 1854; and in accordance therewith to allow in such measurement for the space occupied by or required to be inclosed for the proper working of the boilers and machinery, with the addition of one-half of the tonnage of such space, and to grant a certificate of such remeasurement; and commanding the said William Pugh Gardner thereupon either to grant a new certificate of registry, or to endorse on the existing certificate of registry of said vessel the memorandum prescribed by said Act in that behalf: on the ground that the said Company have done all the acts, matters, and things required in that behalf to entitle them to have the said vessel remeasured and registered in the manner by this order sought.

From the affidavit of the secretary of the Company it appeared that, prior to the year 1855, their steam-vessel, the St. Columba, was duly registered, in the name of the Company, in the registry of the port of Dublin; and that in that year the Directors of the Company had her remeasured in accordance with the provisions of the Merchant Shipping Act, 1854.

In that remeasurement the allowance for the space occupied by engine-room or propelling power, as provided by the 23rd section (clause B) of the Merchant Shipping Act, 1854, was made by deducting from the gross tonnage the tonnage of the space occupied by, or required to be inclosed for, the proper working of the boilers and machinery, with the addition of one-half the tonnage of the said space. Her tonnage for dues was thus reduced from 326 tons to 206 tons; was so entered in the registry of the shipping of the port of Dublin; and so still remains.

In the year 1862, the St. Columba was lengthened by an addition of forty feet. This alteration in the ship was made at Liverpool, and increased her tonnage so as to necessitate a remeasurement, under the provisions of the Merchant Shipping Act, 1854. While the St. Columba lay in the builder's dock at Liverpool, a surveyor, appointed for the purpose under the Act, did, without any applica-

tion by the Company remeasure her; and found that her gross tonnage had been increased from 588 tons to 653 tons. The customs officers then insisted that they were entitled to add 252 tons to the *St. Columba's* registered tonnage for dues; and that the former allowance for the space occupied by engine-room or propelling power was to be taken at 196 tons, the exact space so occupied, without an addition thereto of one-half the tonnage of said space. This mode of admeasurement was insisted upon in pursuance of certain modifications alleged to have been duly made under the 29th section of the Merchant Shipping Act, 1854, in the tonnage rules thereby prescribed; and was objected to by the Company.

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After some correspondence between the secretary of the Company and Mr. Gardner, it was arranged that the *St. Columba* might sail under the new admeasurement, upon the express understanding, nevertheless, that doing so should not prejudice the Company pending the consideration of the question, or in any proceedings to be taken by them in order to establish their right to a proper measurement. Under this arrangement the *St. Columba* now runs between Dublin and Liverpool, as the Company have not been able to procure a registry of her with the allowance claimed by them. There is a registrar of shipping at Liverpool.*

The *Solicitor-General* (*James A. Lawson*), *Macdonogh*, *Brooke*, *T. Harris*, and *Jebb*, showed cause.†

The form of the proceeding is wrong. It is not shown that the 17 & 18 *Vic.*, c. 104, requires the defendants to remeasure a ship which has been altered in Liverpool, and remeasured there by a competent officer duly appointed for that port. If the writ of *mandamus* could be granted at all in such a case, it should be directed to the Commissioners of Customs in *England*. But the

* As the case was finally decided only on the ground of want of jurisdiction, it became unnecessary to set out the other facts stated in the several affidavits.

† The argument on the preliminary point alone has been reported.

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writ cannot be granted against them: *The King v. The Commissioners of Customs* (a). Therefore, *a fortiori*, it cannot be granted to compel an inferior officer of theirs to remeasure a ship in a manner contrary to their positive orders. The prosecutors should have sought a different remedy—namely, an action against the Commissioners of Customs in England, for refusing to perform the ministerial duty cast upon them by the statute: there are not any Commissioners of Customs in Ireland.—[O'BRIEN, J. Has this Court jurisdiction to grant a writ of *mandamus* to an English body, when the writ is applied for in respect of a vessel the property in which happens to be in a Company resident in Ireland, when the act complained of took place in England?—The prosecutors allege that, as Dublin is the port of registry of the *St. Columba*, they are entitled to have her remeasured in this port, and registered here anew. But the prosecutors have, under the Common Law Procedure Amendment Act (*Ir.*), 1856, a complete remedy by praying for a writ of *mandamus* in the summons and plaint. An action has been maintained against the Commissioners of Customs for not having performed a ministerial duty: *Barry v. Arnaud* (b). But the defendants have not *wrongfully* refused to remeasure the ship. Besides, it was their duty to refuse to remeasure a ship in a manner contrary to the orders of their superiors.—[O'BRIEN, J. It would be hard to say that Mr. Gardner has been appointed by the Commissioners of Customs to remeasure a ship which has been already, for the purpose of registry, remeasured in Liverpool by the proper officer.]—Just so; if that remeasurement was right, the prosecutors have no case; and, if it was wrong, they should have taken their proceedings in *England*. At all events, a writ of *mandamus* will not lie to an inferior officer to compel him to do a ministerial act: *The King v. Shaw* (c); *The King v. Bristow* (d); *The King v. Jeyes* (e). *A fortiori* this Court will not grant the writ to compel an inferior officer to disobey the order of his superiors, who are not even brought before the Court.

(a) 5 Ad. & El. 380.

(b) 10 Ad. & El. 646.

(c) 5 T. Rep. 549.

(d) 6 T. Rep. 168.

(e) 3 Ad. & El. 416.

Brewster, Chatterton, and J. F. Townsend, contra, were heard on the preliminary point. E. T. 1864.
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Mr. Gardner is not an inferior officer; he is the appointed registrar of shipping in the port of Dublin, and holds that office independently of anybody else. The prosecutors ought to apply in this Court for the writ, instead of going to the Court of Queen's Bench at Westminster.—[FITZGERALD, J. If the writ goes, and the return made is that this vessel was remeasured in Liverpool by the duly appointed surveyor; that the surveyor has returned her certificate hither; and that Mr. Gardner is willing to register her accordingly, that would be true, and a sufficient return. The remeasurement in Liverpool is one over which we have no control.]—Every vessel has, under the Merchant Shipping Act, 1854, some particular port of registry; and every act connected with her must be done in that port, until it is changed. Under section 84, the certificate of alteration must be transmitted, by the surveyor of the port at which the alteration was made, to the registrar of the port of registry, who must then enter in the register-book the particulars of that alteration. In Liverpool was effected the alteration which necessitated a remeasurement of the *St. Columba*; and that remeasurement, if not made in accordance with the statute (sections 20 to 29), was a nullity.—[FITZGERALD, J. There the case presses upon you; for if the remeasurement in Liverpool was so, the proper course for the prosecutors to have adopted would have been to apply to the Court of Queen's Bench in England for a writ of *mandamus* to compel the officer at Liverpool to remeasure the vessel according to correct principles.]—But, as the remeasurement in Liverpool was null, it is the same as if the vessel had never been remeasured there at all; and the case becomes that of a vessel coming to her own port of registry to be remeasured there.—[O'BRIEN, J. The registrar in this port cannot act except on the document which he receives from the surveyor in Liverpool.]—If the remeasurement in Liverpool was void, how can the prosecutors obtain a new one? If they applied to the surveyor in Liverpool, he would say that he had transmitted his certificate to Mr. Gardner, and was *functus officio*.

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E. T. 1864. Therefore the application must be made in Dublin. The statute
Queen's Bench does not require that the remeasurement shall be made in the
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Macdonogh, in reply, contended that, under the plain words of the 17 & 18 *Vic.*, c. 104, s. 84, the Court had no jurisdiction; and that the prosecutors must proceed within the jurisdiction in which the port of alteration was situated, as there was a registrar of shipping at Liverpool.

Cur. adv. vult.

LEFROY, C. J.

April 18.

This case stood over for the consideration of a preliminary point, upon which it occurred to us that the case might be decided. We think it therefore unnecessary to go into the other points of the case. Since the argument, we have had an opportunity of fully considering, all the clauses of the Act of Parliament upon the construction of which this question depends; and I can say, for my own part at all events, that I have gone through every section relating not only to the preliminary question, but to the whole case. Those sections will be found to be the 19th to 29th, 84th, 85th, 86th, and 87th.

The preliminary question is, who was the only proper person qualified to give what is sought for here, namely, such a certificate of measurement as would entitle the owners of the ship to the allowance sought for on account of the space occupied by the "propelling power"? Now in the 84th section it appears, in the plainest possible terms, that this allowance (which is to be given in consequence of an alteration made in the ship) is to be made when the ship, or its contents for tonnage, has been so altered as to vary the tonnage of the ship; and then there shall be a new registry. It was one of the great objects of the statute that the public might have materials by which to ascertain clearly the tonnage of the ship; and that it should not be necessary for them, when contracting for the services of a ship, to go and measure her. Therefore there was a great object of public policy in thus requiring the tonnage of the ship to be registered.

An alteration was made at Liverpool in the *St. Columba*, by adding forty feet to her length. Of course that alteration affected her tonnage, so as to make it not correspond with the particulars in the registry-book; so that she must be registered *de novo*, according to the new tonnage; or at least there must be entered on the original certificate a memorandum of the change made in the tonnage of the ship, which was to be ascertained by the application of any new rules which might have been made. But the very section (84) that made this provision with respect to the alteration, and the new registry, or the recording of it, enacted that "if such alteration is made at a port where there is a registrar, "the registrar of such port . . . shall, on application "made to him, and on the receipt of a certificate from the proper "surveyor, specifying the nature of such alteration, either retain "the old certificate of registry, and grant a new certificate of registry, containing a description of the ship as altered, or endorse "on the existing certificate a memorandum of such alteration, and "subscribe his name to such endorsement." Therefore the port of *alteration*, *not* the port of registry, is the port the registrar of which, if there be a registrar there, is the person who alone could perform the duty that was necessary; and therefore he would be the person to whom we, if we had the jurisdiction to grant this writ of *mandamus*, should direct it. But we have no jurisdiction to order *him* to do the act which the prosecutors desire to have performed; and therefore we have neither the person nor the jurisdiction to enable us to make absolute this conditional order.

We allow the cause shown with costs.

O'BRIEN, J., concurred.

FITZGERALD, J.

The conditional order in this case was one calling upon the collector of customs and the registrar of shipping in the port of Dublin to remeasure the *St. Columba*, according to certain principles, and, having remeasured her, either to grant a new certificate, according to such remeasurement, or to endorse it upon the old certificate. Early in the argument it appeared to me that the prosecutors had

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entirely mistaken their proceeding. The survey was made in Liverpool, which was the proper port to make it at; the alterations in the *St. Columba* having been effected there. The surveyor in Dublin was afterwards called upon to remeasure her, the old certificate having been given up to the registrar at Liverpool, he, in pursuance of his duty, transmitted the certificate to the registrar here, where the entry on the register should be made. The remeasurement having taken place in Liverpool, it is beyond our powers to compel to be done again in Dublin what has been already done in Liverpool. If the prosecutors quarrelled with the acts of the registrar in Liverpool, who was the proper officer to give a new certificate, or make the necessary endorsement on the old one, the course to be pursued was plain, namely, to go to the Court of Queen's Bench at Westminster, and ask for a writ of *mandamus* to the officer in Liverpool. But the prosecutors come here, asking us to compel certain officers, whose duty it is not, to remeasure the *St. Columba*, and give a new certificate of registry, or endorse the memorandum on the old one. We have no power to do so. If the prosecutors, having got the *St. Columba* properly remeasured in Liverpool, had got the proper certificate from the officer there, they might come here, and ask us for a writ of *mandamus* to compel the registrar in this port to enter the particulars in the register-book.

We offer no opinion whether the prosecutors, having lost the benefit of the old registry, might, on the ground that the *St. Columba* is a new ship, come to ask for a totally new registry of her. If that is to be their application, they have not laid the foundation for it; and we offer no opinion whether we could compel a first registry of the ship now. Our rule must therefore be to allow the cause shown.

But one point was very much pressed by the *Solicitor-General*, which I do not wish to pass unnoticed, namely, that we have no authority in this Court to question the decision of the Board of Trade upon the new rules of measurement. I have listened to the argument, and have heard nothing from the learned *Solicitor-General* to shake my opinion that, though we ought not to consider

the propriety, or the wisdom, or the expediency of any new rules made by the Board of Trade, yet it *is* our province to see that the Board of Trade does not exceed the powers which the law gives. If the Board of Trade exceeds its legal authority, this tribunal, and the Court of Queen's Bench at Westminster, have full controlling power.

See Smith's Mercant. Law, p. 183, 7th ed.; Maude & Pollock's Merch. Ship., 3rd ed., p. 16.

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SAMUEL SHAW v. WILLIAM GALT.*

THIS action was tried at the last Assizes for the county of Antrim, before FITZGERALD, B., and was brought to recover the amount of four bills of exchange, each of which had been drawn by the plaintiff on the firm of "J. and W. Wallace," accepted in the name of that firm, payable four months after date. The bills were dated respectively 21st of August, 20th of September, 20th of October, and 20th of November 1857, and their respective amounts were, £754. 9s. 11d., £680. 13s. 3d., £232. 2s. 0d., £583. 7s. 4d.

One count on each bill stated it to be drawn on the defendants James Wallace and William Wallace, under the style and firm of "J. and W. Wallace," with an allegation (not traversed) that J. and W. Wallace were afterwards discharged by bankruptcy, and were out of the jurisdiction, and that the acceptance was by

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By agreement between J. and W. Wallace of the first part, and G. of the second part, G. bound himself, "in consideration of salary and others," to do certain services for the parties of the first part, for the period of three years; and in consideration of the said services, the said J. & W. Wallace, "as co-partners, and as individuals, and their company firm,"

agreed to pay the said G. a salary of £500, and also that he should be entitled to a sum equivalent to one-third part of the free profits, for the said period, of the business of the first party; the said profits to be ascertained "by balance-sheets, to be prepared by the said first party, on the principle hitherto adopted by them," and at such periods as they should think proper. Before ascertaining the free profits, J. W. and W. W. to have £500 a-year each; the other sums payable to G. besides his salary not to be demandable by him during the period of his engagement, but to be payable by three equal instalments, as follows, &c., with interest on the two last. The plaintiff was the drawer of certain bills accepted by J. & W. W., and sued the defendant as a partner in the firm.

Held—That the defendant was not a partner.

Semle—That "free profits" are equivalent to net profits.

* Before O'BRIEN, HAYES, and FITZGERALD, JJ.

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On each bill there was also a count stating it to have been accepted by the defendant.

To the first set of counts there were defences traversing the partnership and the acceptances.

To the second set of counts there were defences traversing the acceptances. The only substantial question in the case was, whether the acceptances of the four bills by the firm of J. and W. Wallace bound the defendant, by reason of his being a partner in the firm?

It is not necessary to state the evidence in detail, because the only question debated in this Court related to the construction of an agreement between the defendant and the Messrs. Wallace, which agreement subsisted up to the time of the bankruptcy of the Wallaces. That agreement was in these terms:—

"MINUTE OF AGREEMENT between James Wallace and William Wallace, sewed muslin manufacturers in Glasgow, co-partners carrying on business there, as sewed muslin manufacturers, under the firm of J. and W. Wallace, on the one part; William Galt, presently in the employment of the said J. and W. Wallace, on the other part.

"*First*:—The said second party, in consideration of the salary and *others* to be paid to him as hereinafter expressed, hereby agrees and binds and obliges himself to take the entire charge of, and to manage efficiently, under the superintendence and directions of the said James Wallace and William Wallace, or either of them, the manufacturing department of the said first party's business, and *that* for and during the entire space of three years, from and after the first day of August 1856, which is hereby declared to have been the commencement of his engagement under these presents, notwithstanding the date hereof; during which space or period the said second party shall devote his whole time and attention to the conduct and management of the said department of said business, and faithfully and honestly discharge the duties thereof, as well as attend to all the instructions which from time to time he may receive from the said James Wallace and William Wallace, or either of them, in relation

"thereto; and he shall not engage himself or be concerned, directly
 "or indirectly, either by himself or by others on his account, in any
 "other business whatever."

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"*Second* :—In consideration of the services to be rendered to the
 "said first party by the said second party, in manner herein before
 "expressed, the said second party shall be entitled to receive, and
 "the said James Wallace and William Wallace shall be bound as
 "they hereby agree, and bind and oblige themselves as co-partners
 "aforesaid, and *as individuals*, and their said company firm of
 "J. and W. Wallace, to pay to the said second party a salary of
 "£500 for each year of the foresaid period of his management, and
 "that by monthly, quarterly, or half-yearly instalments, as he may
 "think proper. And further, the said second party shall be entitled
 "to a sum *equivalent* to one-third part of the *free profits* for the
 "foresaid space or period of three years of the business of the said
 "first party, as the said profits shall be ascertained by balance-
 "sheets, to be prepared by the said first party on the principle
 "hitherto adopted by them in taking their balances, and at such
 "periods as to them may seem proper; and it being understood
 "that, before ascertaining the free profits, credit shall be given to
 "each of the said James Wallace and William Wallace for a salary
 "for individual services at the rate of £500 per annum. But de-
 "claring always, as it is hereby specially provided and declared and
 "agreed to by the said second party, that, whilst the said salary
 "shall be payable to him as before expressed, *the other sums* to
 "which he shall be entitled in virtue hereof shall *not be demandable*
 "*by him during the period of his engagement*, but shall be payable
 "by three equal instalments, as follows, viz.:—"The first instalment
 "on the first day of August 1859; the second instalment on the
 "first day of December following; and the third and last instalment
 "on the first of April 1860, together with interest on the two last
 "instalments at the rate of five per cent. per annum."

"*Third* :—The said first and second parties agree that if any
 "disputes or differences shall arise between them in regard to the
 "true intent and meaning of these presents, as to the due implement
 "thereof, or in any manner of way in relation thereto, the same

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"shall be submitted and referred, and accordingly they hereby submit and refer the same, to the final decision of Anderson Kirkwood, Esq., writer, Glasgow, whom, failing James Stevenson, Esq., writer, Glasgow, as sole arbiter chosen by the parties, and the decisions partial or final of the arbiter who may act for the time shall be binding on both parties." And—

"*Lastly* :—The said first and second parties agree, and bind and oblige themselves to implement and fulfil their respective parts of these presents, each to the other, under the penalty of £500, to be paid by the party failing to the party observing or willing thereto, over and above performance."

"In witness whereof these presents, consisting of this and the preceding page, together with the marginal addition on page first hereof written on stamped paper by James Harvey, clerk to Drew and M'Clure, writers, Glasgow, are under the declaration before subscription that the word "sale" on the eleventh line of the first page is delete, subscribed by said James Wallace, otherwise called James Wallace junior, William, and J. and W. Wallace (the said company name being adhibited by the said William Wallace), and by the said William Galt, all at Glasgow, upon the 4th day of September 1856 years, before these witnesses, the said James Harvey and Archibald Smith, salesman to the said J. and W. Wallace."

"J. & W. WALLACE.

"JAMES WALLACE jr.

"JAMES HARVEY, witness.

"W. WALLACE.

"ARCHIBALD SMITH, witness.

"WM. GALT."

The learned Baron told the jury "that, when there was mutual participation of the profits and loss of a trade between persons, they were partners between themselves, and of course liable as such to creditors."

"That, when there was participation by a person in the profits of a trade, he was a partner, as to creditors, because he took a portion of the fund to which the creditors had a right to look for payment, even though he might not have the rights and liabilities of a partner as between himself and the other persons concerned in the trade."

"That, consequently, if, by the agreement of 1856, the defendant
 "was to participate in the profits of the trade of J. and W. Wallace,
 "he would be liable to the plaintiff on the acceptances of that firm,
 "even though the same agreement might show that he had not all
 "the rights and liabilities of a partner as between himself and the
 "Wallaces."

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"That the participation in the profits, to make a party so liable,
 "must be a participation in the profits *as such*; and that a salary
 "regulated by, and varying with the amount of the profits, or
 "the making the profits in the whole or in part the sole fund
 "for the payment of the salary, would *not* constitute a participation
 "in the profits *as such*."

"And I then told them that I was disposed to think, and so
 "directed them as matter of law, that the defendant was *not*, by
 "the instrument of September 1856, entitled to participate in the
 "profits *as such* of the trade of J. and W. Wallace."

The jury found a verdict for the defendant.

The learned Baron then reserved to the plaintiff liberty to
 move the Court above to enter a verdict for him for the amount
 remaining due on the bills, if the Court should be of opinion that
 the agreement of September 1856 gave the defendant a right of
 partnership in the profits, *as such*, of the firm of J. and W.
 Wallace.

Accordingly, in Michaelmas Term (November 4th) the plaintiff,
 pursuant to the leave reserved to him, obtained a conditional order
 to set aside the verdict, and enter a verdict for himself, on the
 ground that the agreement of the 4th of September 1856 consti-
 tuted the defendant a partner in the firm of J. and W. Wallace.

Macdonogh, Harrison, and Falkner, showed cause.

The question is, whether the deed of agreement gave the de-
 fendant a right to participate in the profits, *as profits*, or whether
 the account was to be taken merely with a view to ascertain the
 amount of free profits? In *Ex parte Hamper* (a) Lord Eldon
 no doubt said:—"It is clearly settled, though I regret it, that if

(a) 17 Ves. 403.

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"a man stipulates that as the reward of his labour he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of the profits, that will not make him a partner; but, if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner; and in a question with third persons no stipulation can protect him from loss." The latter part of that proposition has been universally questioned. The expression "partnership," as to third persons, is a solecism in language. The real principle on which the law holds a man liable as a partner is, that he by his conduct misled others, and induced them to give credit which otherwise they would have withheld. The circumstance that a man is entitled to a share in the profits will not of itself constitute him a partner: *Geddes v. Wallace* (a); *Rawlinson v. Clarke* (b); *Stocker v. Brockelbank* (c); 1 *Lind. Part.*, pp. 14, 15; *Pott v. Eyton* (d). Therefore it is a principle—established at law and in equity—that a clerk or agent may receive, as a stimulus to his industry, a proportion of the profits of the business, and yet not be a partner. The deed itself shows that between these parties a partnership did not exist. In *Geddes v. Wallace* (e) the Lord Chancellor, in his judgment, said:—"It is not immaterial to observe that, though he" (Geddes) "is unquestionably a partner, to some purposes, yet he is treated, in the very description of the parties to this instrument, as an individual of the third part, separate from those of the first and second parts." So, in the present case, the defendant is treated as a person distinct from the traders James Wallace and William Wallace. They are described as constituting the firm, which is the first party to the deed of agreement, while the defendant is the second party, and, so far from being a member of the firm, is described as "presently in the employment of the said J. and W. Wallace." Again, J. and W. Wallace were *themselves* to make up the balance-sheets on the principle established in their firm; and

(a) 2 Bligh, 270.

(b) 15 M. & W. 292.

(c) 3 M'N. & Gor. 250.

(d) 3 C. B. 32.

(e) 2 Bligh, 292.

the defendant could not, until his engagement had terminated, compel them to account for the profits. Furthermore, *each* of the Messrs. Wallace was to be allowed a sum of £500 a-year before ascertaining the free profits; so that if the profits amounted to £999 a-year only, the defendant would not have been entitled to receive one farthing beyond his fixed salary of £500 a-year, which proves that he was not to get any proportion of the profits *as profits*. The Messrs. Wallace retained to themselves entire dominion over the moneys; and, though they had a right to retain not only £500 a-year each, "for a salary for individual services," but also to retain, *year by year*, their two-third parts of the free profits; whereas the defendant was not to receive his share of the free profits *pari passu* with the Messrs. Wallace, who it is alleged were his partners, but was to wait until his engagement had ended. The agreement placed the defendant in a very disadvantageous position in that respect. It might happen that, on two of the three years during which the agreement was to last, large profits would be made, which would be wholly swallowed up by losses in the last year; in which event the defendant could not receive one farthing of the profits; and yet it is now sought to make him liable for losses incurred by traders in whose profits he was not entitled to participate year by year. The general doctrine of *quasi* partnership, resulting from a share in the profits, was stated by De Grey, C. J., in *Grace v. Smith* (a):—"Every man who has a share of the profits of a trade, ought also to bear his share of the loss. And if anyone takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment."—[See 1 *Lind. Part.*, pp. 35, 42]. But that was a mere *dictum*, which has been overruled: *Hickman v. Cox* (b)—*per* Martin, B., whose judgment has been upheld in the House of Lords: *Wheatcroft v. Hickman* (c). In *Story's Law of Partnership*, section 49, that author says:—"It seems harsh, if not unreasonable, to crowd upon him the duties and responsibilities of a partner, which he has never assumed, and for which he has no reciprocity of reward or interest."

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(a) 2 W. Bl. 998.

(b) 3 C. B., N. S. 562-63.

(c) 9 C. B., N. S. 47; S. C., 8 H. of L. Cas. 269.

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The principle of law is that, where one man is interested by an arrangement between himself and others, in a fund to which the creditors of those others have a right to look for payment of their debts, that man is, *quoad* the creditors, a partner of their debtors. Another test of partnership is, whether it can be gathered from the deed that each party to it had a right to have an account taken, in order to ascertain the sum to which he is entitled? An application of both these tests will show that the Messrs. Wallace and the defendant were, by the arrangement between them, made partners, with respect to the rest of the world; and that, as against them, there is nothing to disentitle the plaintiff to be recouped any loss incurred by him in his dealings with them. The cases cited for the defendant relate to the principles which make people partners *inter se*: they relate moreover to *gross* profits, not "free profits"—an expression which means *net* profits, as distinguished from *gross* profits; but *net* profits cannot be ascertained until an account has been taken. It has not been shown that the Messrs. Wallace and the defendant did not act on the footing of a partnership.—[FITZGERALD, J. The question of fact on that point would have been, whether there was a partnership in *Scotland* between them? I asked to see one of the bills of exchange on which this action has been brought, in order that I might see whether the contract was a Scotch one, or an Irish one.]—The bills were drawn in Ireland, and accepted in Scotland. The Messrs. Wallace had an establishment in Belfast, where the defendant was their agent. But the plaintiff does not rely at all upon the Scotch law. There is in this case a circumstance which distinguishes it from all others on the subject, namely, that *each* of the three persons who entered into the contract was to receive a fixed annual salary in remuneration of his individual services; so that they were all in the same position.—[O'BRIEN, J. The three individuals were not placed by the deed in the same position; because the defendant was to be paid £500 a-year, *in the first instance*, and *then* each of the Messrs. Wallace

was to get £500 a-year.]—No doubt that difference existed. But, besides his specified salary, the defendant was to receive a sum equivalent to one-third part of the free profits; so that in that respect he was put in the same position as the Messrs. Wallace. The words of the deed are, that the defendant “shall be entitled to,” that is to say, “shall be entitled to *take* a sum equivalent to one-third part of the *free profits*,” showing that he was not to be paid as a servant; and that he was to be paid out of the very fund on which the creditors of the firm relied for payment of their debts. But a man who has a specific interest in such a fund is, as to creditors, a partner: *Cheap v. Cramond* (a); *Bloxham v. Fourdrinier*, cited in the argument in *Grace v. Smith* (b). Liability to loss is not essentially necessary to make a man a partner, as to third persons: *Gilpin v. Enderbey* (c); *Greenham v. Gray* (d); *Heyhoe v. Burge* (e); Again, the free profits were to be ascertained by the Messrs. Wallace by balance-sheets, “prepared on the principle”—which must have been the principle of partnership—“hitherto adopted by them in taking their balances.” Lord Eldon’s judgment in *Colbeck’s case* (f) is of more weight than his *dictum* in *Ex parte Hamper* (g), which is controverted in *Montague on Partnerships*, p. 2. *Waugh v. Carver* (h) and *Ex parte Chuck* (i) also show that the defendant was a partner. *Wheatcroft v. Hickman* (k) only decided that the creditors had not intended to make themselves partners by the deed.—[O’BRIEN, J. They were more than creditors: they were trustees.]—At all events they were not entitled to profits indefinitely *pro rata*, but only to the exact amount of their debts. The descriptive words, “presently in their employment,” show that the Messrs. Wallace and the defendant meant to alter the relation which had existed between them.—[FITZGERALD, J. There is this difference between the positions of those parties:—under the deed of agreement the Messrs. Wallace would

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(a) 4 B. & Ald. 670.

(c) 5 B. & Ald. 954.

(e) 9 C. B. 431.

(g) 17 Ves. 403.

(i) 8 Bing. 470.

(b) 2 Sir W. Bl. 999.

(d) 4 Ir. Com. Law Rep. 501.

(f) Buck’s Bankty. Cas. 48.

(h) 2 H. Bl. 235.

(k) 9 C. B., N. S. 47.

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have been entitled to a lien upon the partnership property, and on the profits, for their salaries; whereas the defendant was only entitled to a personal remedy against them.—O'BRIEN, J. Do you contend that the deed created a partnership *inter se* between the defendant and the Messrs. Wallace?—The case of *Greenham v. Gray* (a) goes a long way towards establishing that proposition, for which, however, it is not necessary for the plaintiff to contend. Persons entitled to profits as such are partners, with respect to third parties: 1 *Lind Part.*, props. ii, viii; *Broom's Com. Com. Law*, 2nd ed., p. 536; 3rd ed., p. 545; and the phrases, "a sum equivalent to one-third part of the free profits," and "one-third part of the free profits," are just the same. The phrase "free profits" means "clear gain;" but the expression "gross profits" takes no account whether the business was carried on at a loss or at a gain.—[FITZGERALD, J. "Gross profits" may mean the difference between the selling price and first cost.]—In *Ex parte Hamper* (b), Lord Eldon must have meant "gross returns," because he alludes to cases theretofore decided; and up to that time only four cases had been decided, and they all relate to "gross returns:" *Dixon v. Cooper* (c); *Benjamin v. Porteous* (d); *Wilkinson v. Frasier* (e); and *Dry v. Boswell* (f). There is a case of *The Queen v. Macdonald* (g), but it only related to a partnership *inter se*.

Counsel also cited 1 *Story Cont.*, ss. 206–208, and *Quintilian's Inst.*, bk. iii, c. 26.

Harrison, in reply.

It does not appear that Lord Eldon, when deciding *Ex parte Hamper*, had present to his mind the four antecedent cases which have been cited. In substance his decision was, that a man who received for his services a remuneration proportioned to the profits, was not *therefore* a partner. He used almost the same

(a) 4 Ir. Com. Law Rep. 501.

(b) 17 Ves. 403.

(c) 3 Wils. 40.

(d) 2 H. Bl. 590.

(e) 4 Esp. 182.

(f) 1 Camp. 329.

(g) 31 Law Jour., N. S., Mag. Cas. 67.

expression in *Ex parte Rowlandson* (a). *Ex parte Watson* (b) is to the same effect; so that what he said in *Ex parte Hamper* was not a mere *dictum*. In *Harrington v. Churchward* (c) the party was held not to be a partner; and yet the deed contained words almost identical with those in the deed now before the Court; that is to say, it was "further agreed that in return, and by way of remuneration for his services aforesaid, the said C. J. More should pay unto the said T. Harrington the yearly sum of £450, by equal quarterly payments, and, in addition thereto, a sum equivalent to £10 per cent. on the net profits and earnings, if any," &c. In *Stocker v. Brockelbank*, Lord Truro said:—"In this case if there be a partnership, it can only result from the interest which the contract gives to the plaintiff. Then what is this interest? He is to contribute no capital and sustain no loss, his credit is not to be pledged, he is to manage the trade according to the direction of the defendants, and he has no uncontrollable discretion; the only incident to the contract that can present any ground for the conclusion of partnership is, that his remuneration depends upon the contingency of profits being made"—and then held that the party was not a partner. In both these cases *net profits* was the test which settled the amount of remuneration; and yet it was not argued that any distinction existed on account of the difference between *gross* returns and *net profits*. It has been contended in this case that the deed of agreement put the defendant in the same position as the Messrs. Wallace. That is not so: the firm was liable to the defendant for the entire salary of £500 a-year, even though they never received their own fixed salaries. Moreover, the defendant was to be paid the equivalent for one-third of the free profits, not *as profits*, but *as a debt*: the difference between his rights and those of the other creditors of the firm being, that he was not to be paid until the end of the three years, and not even then unless all the other creditors had first been paid. Therefore the very bills of exchange now sued upon must have been paid before the defendant could have got

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(a) 1 Rose's Bank. Cas. 89.

(b) 19 Ves. 459.

(c) 29 Law Jour., N. S., Chan. 521.

(d) 4 Ir. Com. Law Rep. 501.

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one penny of the free profits. *Greenham v. Gray* (a) did not resemble this case, because there the naked profits were to be shared. In that case (p. 512), Richards, B., said:—"True it is, that persons "may act so as to constitute themselves partners, and become liable "to third persons, while they are not partners, nor liable *inter se* ; "but that has reference to cases where the partnership is worked out "and attempted to be established by matter *in pais*, and is totally "inapplicable here, *where the question is the construction of a "document* ; and there cannot be one construction on this instru- "ment in the case of persons who are partners *quoad* third persons "only, and another in the case of persons who are partners *inter "se*." Now if this deed gave the defendant his equivalent to one- third part of the free profits, not as a *debt*, but as *profits*, there would be no meaning in the words "*a sum equivalent to*." The plaintiff must contend that there is no difference between the deed as actually framed, and as it would be framed if those words had been omitted, and the payments to the defendant had not been postponed. The deed cannot be read as if those words had been left out: *Smith's Merc. Law*, p. 22. Counsel also cited *Ex parte Beater* (b), *Davis v. Harris* (c), and *Berthold v. Goldsmith* (d).

Cur. adv. vult.

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O'BRIEN, J. (after referring to some of the facts of the case).

The conditional order obtained by plaintiff to have a verdict entered for him pursuant to the leave reserved by Baron Fitzgerald at the trial, was on the ground "that the agreement of September "1856 constituted defendant a partner in the firm of J. and W. "Wallace." This is different from the terms of the reservation as stated in the learned Judge's report—namely, that the verdict should be entered for plaintiff if this Court were of opinion "that "said agreement gave defendant a right of participation in the "profits, *as such*, of said firm." It appears to us, however, that as the case stands, the difference is not material ; the questions for our

(a) 4 Ir. Com. Law Rep. 501.

(b) 8 Jur., N. S. 629.

(c) 9 Jur., N. S. 859 ; S. C., 32 Law Jour. N. S., Bank. Cas. 68.

(d) 24 Howard's Rep. (Supreme Court of America), 536.

consideration being substantially the same on either form of reservation. The learned Judge told the jury, in substance, that the participation by a person in the profits of a trade, which was requisite in order to constitute him a partner in that trade, and liable to third parties as a partner, must be a participation in the profits *as such*; and that in his opinion the defendant was not, by said agreement of September 1856, entitled to a participation in the profits *as such* of the trade of J. and W. Wallace. This amounted to a statement, that the agreement of September 1856 did not constitute defendant a partner in the firm as to third parties; and we are of opinion that the direction of the learned Judge was correct, and that accordingly the verdict should stand. It appears that at the trial plaintiff also sought to establish defendant's liability, by reason of his alleged admissions or conduct in holding himself out as a partner, but that there was conflicting evidence on this part of the case, and that the opinion of the jury thereon was in favour of defendant. The case, therefore, depends altogether upon the legal construction of the agreement of September 1856.

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It was observed by the Court, in the early part of the argument, that the agreement appeared to have been executed in Scotland, where one of the Messrs. Wallace's establishments was situate, and where they and defendant then resided; and that, accordingly, the instrument should be construed according to the Scotch law. No question however was raised at the trial, nor any evidence given as to there being any difference between the law of Scotland and of this country, as to the effect which such an agreement would have in creating a partnership; and Counsel on both sides have consented that this case should be decided as if the agreement had been executed in, and was to be construed according to the law of this country.

The material parts of the agreement as regards this case are the first and second paragraphs.—[Reads them.]—It is stated there was a previous agreement between the same parties, the terms of which are somewhat different; but it is not referred to in the present agreement, and cannot be relied on in construing it. It also appears that the bills of exchange, on which this action is

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brought, were accepted in the name of the firm by one of the Messrs. Wallace, in the ordinary course of business, for the purposes of the establishment, in the year 1857, during the time of the three years mentioned in the agreement; so that defendant is clearly liable for them if he was a partner under that instrument.

Plaintiff's Counsel have not contended that this instrument of 1856, *as between defendant and the Messrs. Wallace*, constituted him a partner, nor is it necessary for plaintiff's case to contend for such a construction, inasmuch as it has been settled by several decisions that although, *as between the parties to any such agreement*, the relation thereby created between them may be only that of principal and agent, or master and servant, yet that, *as between them and third persons*, such agreement may *quoad* creditors be considered as a contract of partnership, and as attaching to each of the parties in their dealings with third persons all the liabilities consequent upon his being a partner. Plaintiff's Counsel contend that the instrument now before us has that effect, because the defendant became entitled under it to a share of the profits of the establishment carried on by the Messrs. Wallace; and that, therefore, he should be considered as a partner of the firm in respect of their dealings with third persons, according to the rule laid down by Chief Justice De Grey in his judgment in *Grace v. Smith (a)*, where, with reference to what constitutes a partnership as to third persons, he says:—"Every man who has a share of the "profits of a trade, ought also to have his share of the loss; and if "anyone takes part of the profits, he takes part of that fund on "which the creditor of the trader relies for his payment." The general rule that a participation in profits constitutes a partnership was also recognised in *Waugh v. Carver (b)*, where it was held that A and B, ship agents in different ports, having entered into an agreement to share the profits of their respective commissions, &c., became thereby liable as partners to all other persons with whom either of them contracted for the purpose of their respective ship agencies; even though the agreement between A and B provided that neither of them should be answerable for the acts or losses of

(a) 2 W. Bl. 1000.

(b) 2 H. Bl. 235.

the other, and clearly showed their intention not to be partners. Eyre, C. J., in delivering judgment, stated the question to be whether, by the agreement, one party did not entitle himself and mean to take a moiety of the profits of the house of the other party, generally and indefinitely as they should arise, at certain times agreed on for the settlement of their accounts. And he adopted the reason for this rule, stated by Chief Justice De Grey in *Grace v. Smith*, as I have already mentioned. According, however, to several subsequent authorities, this rule was subject to a material qualification, which bears directly upon the case now before us—namely, that the participation in profits, which constitutes such partnership, must be the participation of a party having a right to a share of the profits *as such*, and a right to an account; and not merely that of a servant or agent receiving for his wages a sum proportioned to his share of the profits. This qualification was clearly laid down by Lord Eldon in *Ex parte Hamper (a)*, where, after stating one question in the case to be whether T and R were partners by reason of their participation in the profits, he says:—“The cases have gone further to this nicety—upon a distinction “so thin that I cannot state it as established upon due consideration—that if a trader agrees to pay another person for “his labour in the concern a sum of money, even in proportion to “the profits, equal to a certain share, that will not make him a “partner; but if he has a specific interest in the profits themselves “‘*as profits*,’ he is a partner.” In a subsequent stage of the case (p. 412), Lord Eldon, after stating that T was clearly a partner as to third persons, but that as between him and R it was a very different consideration, says:—“The ground as to third persons is “this—it is clearly settled, though I regret it, that, if a man “stipulates that, as the reward of his labour, he shall have, not “a specific interest in the business, but a given sum of money, even “in proportion to a given quantum of the profits, that will not “make him a partner; but if he agrees for a part of the profits, “*as such*, giving him a *right to an account*, though having no “property in the capital, he is as to third persons a partner; and

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"in a question with third persons no stipulation can protect him "from loss." This subject was also referred to by Lord Eldon in *Ex parte Rowlandson* (a); and however refined and artificial the distinction may be, it appeared, in his opinion, to have been clearly settled that a party would not be rendered liable to third persons as a partner, on the ground of his participation in the profits of a business, where he has merely stipulated, as a reward for his labour, for payment of a sum proportioned to those profits: a stipulation nearly identical with that in the agreement now before us.

In the application of the principle that persons who share the profits of a concern are to be considered as partners, a distinction was also taken in some cases between a participation in the "*net profits*" of a concern, and in what are called "*gross profits*," but which may be more correctly designated as the "*gross proceeds or earnings*." Thus, in the case of *Heyhoe v. Burge* (b), Lord Wensleydale, then Baron Parke (who tried the case), stated, in his charge to the jury (page 440), "A person who shares *gross profits* is not a partner; but a person who shares *net profits* is "*primâ facie* to be considered as a partner." In the instrument before us, the words used are "*free profits*," which the Counsel on both sides have agreed should be construed as denoting "*net profits*." And I refer to this distinction because plaintiff's Counsel contend that the qualification which I have mentioned as having been laid down by Lord Eldon in *Ex parte Hamper* (c) should be considered as confined to cases where the participation was in the "*gross profits*." But there is nothing in Lord Eldon's judgment to warrant the conclusion that he used the word "*profits*" in any other than its natural and legitimate sense, or that he meant thereby the gross earnings or proceeds of a concern which, after deducting expenses, &c., might leave no "*net profits*" at all. And I do not find in any of the subsequent cases in which Lord Eldon's judgment was referred to, that such a limited interpretation was put upon it. In the case of *Heyhoe v. Burge*, Lord Wensleydale, after telling the jury, as I have already mentioned, that "a person

(a) 1 Rose, 91.

(b) 9 C. B. 431.

(c) 17 Ves. 404, 412.

who shared *net profits* was *primâ facie* to be considered as a partner" (a), states, in a subsequent part of his charge (page 444), that cases sometimes arose in which a person, though taking a share of the profits, was not a partner for some purposes. And he referred to the case of the whale fisheries, stating that although the master, mates and seamen all took a share in the "*ultimate profits*" of the voyage, proportioned to their rate of wages, yet such participation would not constitute them partners so as to render them liable for articles supplied in the equipment of the vessel, but that "it was only a mode of remunerating them for their services." Lord Wensleydale then adds:—"But where a person stipulates for "a share in the *net profits* of a concern, and has a right to an account of the *net profits* as a partner, he is liable, although the "partnership is limited to a single transaction or adventure." It is clear that in the foregoing observations Lord Wensleydale used the words "*ultimate profits*" as synonymous with "*net profits*;" and that, in his opinion, whatever might be the *primâ facie* effect of a person's sharing even in the "*net profits*" of a concern, he would not thereby be constituted a partner, except he also "had a right to an account of the net profits as a partner." And Lord Wensleydale appears to have applied to the case of a participation in "*net profits*" the qualification to which I have already referred as laid down by Lord Eldon. I may here observe, that if the ground upon which a participation in profits was considered as constituting a partnership be (as stated by Chief Justice De Grey in *Grace v. Smith* (b), that "if any person takes part of the profits, "he takes part of that fund on which the creditor of the trader "relies for his payment," it appears difficult to explain why a person should not be rendered liable as a partner by a participation in the *gross profits or proceeds* as well as by one in the *net profits*: the latter are only to be ascertained after deducting and providing for all liabilities; but the amount of a share in the gross proceeds would be ascertained, and might be taken away as soon as they were received, without providing for the liabilities.

This question, as to a partnership being constituted by a par-

(a) 9 C. B. 440.

(b) 2 W. Bl. 1000.

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ticipation in profits, was much considered in the more recent case of *Cox v. Hickman* (a). By referring to the judgments of Lord Cranworth (page 304), and of Lord Wensleydale (pages 312 and 313), it will be seen that in their opinion the law of partnership was to be regarded as a branch of the law of principal and agent; and that the liability of one partner for the acts of another was in truth the liability of a principal for the acts of his agent. In page 313, Lord Wensleydale says:—"If two or more agree that they "should carry on a trade and share the profits of it, each is a "principal, and each is an agent for the other, and each is bound "by the other's contract in carrying on the trade, as much as a "single principal would be by the act of an agent who was to give "the whole of the profits to his employer." And, in page 306, Lord Cranworth, in reference to the rule of a participation in profits being a test of partnership, says:—"This, no doubt, is in "general a sufficiently accurate test; for a right to participate in "profits affords cogent, often conclusive, evidence that the trade "in which the profits have been made was carried on in part for or "on behalf of the person setting up such a claim. But the real "ground of the liability is, that the trade has been carried on by "persons acting on his behalf." And, again, "It is not correct to "say that his right to share in the profits makes him liable to the "debts of the trade. The correct mode of stating the proposition "is to say, that the same thing which entitles him to the one makes "him liable to the other—namely, the fact that the trade has been "carried on in his behalf,—viz., that he stood in the relation of "principal towards the persons acting ostensibly as the traders by "whom the liabilities have been incurred, and under whose "management the profits had been made." Lord Wensleydale also appears to have concurred in this last observation, and says (page 313):—"Perhaps the maxim that he who partakes the "advantage ought to bear the loss, often stated in the earlier cases "on this subject, is only the consequence, not the cause, why a man "is made liable as a partner." In that case the participation of profits relied on as constituting a partnership was a participation

(a) 8 H. of L. Cas. 268.

in the *net profits*, and not in the *gross profits*; and it was held by the House of Lords, that such participation, under the deed of agreement between the parties, did not constitute a partnership as to third persons. It is true the agreement in that case was essentially different in its provisions from the agreement in the present case; but the passages which I have cited from the judgments of Lord Cranworth and Lord Wensleydale bear materially upon the question we have now to decide. (The principle to be collected from them appears to be, that a partnership, even as to third parties, is not constituted by the mere fact of two or more persons participating or being interested in the net profits of a business; but that the existence of such partnership implies also the existence of such a relation between those persons as that "each of them is a principal and each an agent for the others;" and that each of them is also entitled as partner to an account from the others.)

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I shall now consider how that principle is applicable to the agreement before us. It describes the Messrs. Wallace as then carrying on business "under the firm of J. and W. Wallace," and describes defendant as then in their employment; and it clearly shows that, not merely the salary of £500 a-year, but also the further sum to be paid to defendant as equivalent to one-third of the profits, were provided for him as a remuneration or wages for the services to be rendered by him for the term of three years, as therein mentioned. The first paragraph, in which he agrees to give those services, states that he does so "in consideration of "the salary *and others* to be paid to him, as hereinafter mentioned:" (this word "*others*" evidently referring to what is mentioned in the second paragraph as "a sum equivalent to the one-third of the free profits"). The first paragraph states what defendant's services are to be, and provides, amongst other things, that he should take charge of and manage, "*under the superintendence and direction of the Messrs. Wallace, or either of them,*" for the period of three years from the 1st of August previous (which was declared to be the commencement of his engagement, though prior to the date of the agreement); and should, during said period, devote his time, &c., to said management, and faithfully discharge the duties thereof, and

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 “receive from the Messrs. Wallace, or either of them.” These provisions import that the Messrs. Wallace were to be *principals*, and defendant *their agent*, but are inconsistent with the supposition that the Messrs. Wallace were also to be defendant's agents, and he their principal. The second paragraph states that, in consideration of defendant's services, he should receive from the Messrs. Wallace, and they should pay him, a salary of £500 a-year, by monthly, quarterly, or half-yearly payments, as he should think fit: it then declares that, *further*, he should be entitled to a sum equivalent to one-third of the free profits. The circumstance of this latter provision being contained in a distinct sentence or clause from that relating to defendant's salary, has been relied on by plaintiff's Counsel as showing that the provision as to the equivalent sum which defendant should receive in respect of the profits was for a different purpose from that for his salary; but such circumstance (if at all material) may be accounted for by the subsequent special provisions for the ascertaining and payment of that equivalent sum, which could not have been conveniently introduced into the same clause as the provision for his salary.

Plaintiff's Counsel further contend that the allowance of £500 a-year also to each of the Messrs. Wallace, as “a salary for individual services,” had the effect of placing them and defendant on the same footing, with respect to the application of the profits, and their interest therein. But this is not so, because defendant's salary was to be paid without reference to the amount of the profits, which *might* not be sufficient to pay that salary, and also the £500 a-year to the Messrs. Wallace. Considering these and the other provisions of the agreement, can it be said that it constituted a partnership between defendant and the Messrs. Wallace, according to the principles laid down in the cases to which I have referred? Although under that agreement he was certainly interested in the amount of the profits, he had not under it the right, which a partner would have, to require, from time to time, an account of such profits to be taken, and the amount of his share paid to him, if the state of the partnership funds permitted, or if the Messrs. Wallace had received

or unduly appropriated his share. On the contrary, the agreement expressly provides that the profits should be ascertained by balance-sheets, to be prepared by the Messrs. Wallace, on the principle theretofore adopted by them, "*and at such periods as to them might seem proper.*" So that the account of such profits, and the ascertaining of the amount to be paid to defendant in respect thereof, might be postponed by them until the expiration of said period of three years. And, even supposing that amount was sooner ascertained, still the *payment* of it is expressly postponed until after the expiration of that period, when it was to be made in three instalments, the last of them not payable for a year afterwards. It is further to be considered that the agreement to pay defendant such equivalent sum gave him merely a personal remedy against the Messrs. Wallace; and though defendant might, on certain contingencies, be entitled to proceed in equity, for the purpose of ascertaining such amount, and compelling its payment by the Messrs. Wallace—[See *Harrington v. Churchward* (a)],—yet the agreement did not give him the right, which a partner would have, of a *lien* on the partnership property for that amount, and of enforcing that lien by a receiver over the property. With respect to defendant's rights and position, as between him and the Messrs. Wallace under this agreement, the foregoing case of *Harrington v. Churchward*, and another case cited in the argument—*Stocker v. Brockelbank* (b)—may be referred to, although in both those cases the question arose between the parties themselves. It was held by Vice-Chancellor Wood, in the former case, and by Lord Truro in the latter, that the mere circumstance of the agreement providing that one of the parties should receive, as a remuneration for his services, a sum equivalent to a certain share of the "*net profits*," did not constitute a partnership between him and the other parties. And, according to the opinion expressed by Lord Truro, it would not constitute a partnership even as regarded the creditors. In his judgment (c) he says:—"There is nothing in common between the parties—neither capital,

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(a) 29 Law Jour., Ch. 521.

(b) 3 M'N. & G. 250.

(c) 3 M'N. & G. 263.

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"liability, nor participation in loss. The plaintiff has neither the liability, nor the authority, nor the interest of a partner; he could not be joined as a plaintiff in any legal proceeding to assert the rights of the partnership; nor could he be made defendant in respect of any partnership liability." And again (p. 264):—"If the forty per cent. was but a mode of measuring the amount of wages, salary, or remuneration, I do not think that its being contingent upon profits has any effect in creating a partnership." It is true that, in the case before Lord Truro, the agreement expressly provided that "nothing herein contained should extend to constitute a partnership between the parties." And in both cases there was a provision for the determination of the employment and dismissal of the party, if he neglected his duty; but it will be seen that the judgments of Lord Truro and Vice-Chancellor Wood were independent of those provisions; and in other respects the provisions of those agreements, as to taking the account of the profits, and the ascertainment and payment of what defendant was to receive in respect thereof, were far more in accordance with the rights of partners than those to which I have referred, as in the agreement now before us.

Several authorities have been relied on by plaintiff's Counsel; but it will be found, on reference to them, that the facts of those cases, and the provisions of the agreements upon which the questions in them arose, were essentially different from those in the present case. In *Greenham v. Gray* (a), it was held that, under an agreement entered into between plaintiff and defendant, the plaintiff was the partner of defendant, and not (as contended for by the defendant) merely his hired servant. Baron Greene, in his judgment (page 509) says:—"In all the cases cited on behalf of the defendant something appeared on the face of the agreement which showed clearly the subordinate position of the party; but in this contract there is nothing to enable the Court to say that the relation of master and servant is established." And again, in page 510:—"It is very clear that this agreement is consistent with the relation of partners *inter se*; and nothing

(a) 4 Ir. Com. Law Rep. 501.

"appears to show an intention to establish the relation of master and servant." Baron Richards also, in his judgment, relied upon provisions in the agreement that the plaintiff was to have the absolute control and management of the business, and the power of employing and dismissing all persons required for the establishment;—provisions not likely to be inserted if the relation contemplated by the parties was only that of master and servant. I need not observe upon the material difference between those provisions and the present agreement. In the case of *Cheap v. Cramond* (a), where a partnership was held to subsist between two parties, on the ground of their equal participation in the profits of a business, there was nothing in the agreement or transactions between them to show that their relation towards each other was not to be that of partners, or to rebut or qualify the *prima facie* inference of partnership, which, according to the opinions of Lord Wensleydale and Lord Cranworth, was to be drawn from a participation in *net* profits. Again, in *Barry v. Nesham* (b), where the defendant was held liable to creditors as a partner of Lowthin, it appeared that, under the agreement between them, the defendant was entitled to certain portions of the profits, and not merely to sums equivalent thereto; and, although Wilde, C. J., in his judgment (page 655), states, in general terms:—"All the cases seem to agree that, whatever be the private stipulations between the parties themselves, an agreement for a participation in the profits constitutes a partnership as to third persons." The rule is stated in a more qualified manner by Coltman, J. (page 657), where he says:—"A party who stipulates for a participation in profits *as such*, is liable as a partner, *quoad* third persons, notwithstanding he may have expressly stipulated that he shall not be subject to losses." And the passage I have referred to from the subsequent judgment of Chief Justice Wilde himself, when Lord Chancellor (*Stocker v. Brockelbank*), shows that in his opinion the rule was not an invariable one, but admitted of qualification.

(a) 3 B. & Ald. 663.

(b) 3 C. B. 641.

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With respect to the case of *Heyhoe v. Burge* (a), although, upon the particular circumstances of that case, and the finding of the jury, the defendant was held to be liable to creditors as a partner, yet the passages I have cited from Baron Parke's charge to the jury (page 444) furnish grounds for coming to a contrary conclusion, with respect to the agreement before us. And, though Cresswell, J., in his judgment (page 458), lays down, as a general rule, "That an agreement between the parties to be jointly interested in the profits of a transaction, constitutes a partnership," he does not dissent from what was stated by Baron Parke, in his charge, as to the qualifications of that rule.

Without referring in detail to the other authorities relied on by plaintiff's Counsel, we think it sufficient to say that, in our opinion, none of them can be relied on as establishing principles contrary to those laid down by Lord Eldon, Lord Cranworth, and Lord Wensleydale, as I have already mentioned.

On these several grounds we are of opinion that the agreement before us did not (even as to creditors) constitute defendant a partner in the firm of J. and W. Wallace; and that, accordingly, the verdict obtained by defendant should stand. The plaintiff's conditional order must therefore be discharged with costs.

HAYES and FITZGERALD, JJ., concurred.*

(a) 9 C. B. 440.

* See *Bullen v. Sharp* (1 L. R., C. P. 86), where *Cox v. Hickman* and *Waugh v. Carver* are discussed.

E. T. 1865.
Common Pleas.

DOMVILE v. WARD.*

(*Common Pleas.*)

May 4, 6, 11.

DEMURRER.—The summons and plaint stated that the defendant held part of the lands of Ballyfermot, containing 24 acres and 7 perches, &c., as tenant to the plaintiff under a lease, at the yearly rent of £61. 15s. 0d., and that the sum of £61. 15s. 0d., being for one year of such rent due and ending on the 25th day of March last, is due to the plaintiff; and therefore the plaintiff prays judgment against the said defendant, to recover the possession of said lands and premises, &c.

Defence.—That, as to the sum of £2. 8s. 1½d., portion of the sum of £61. 15s. 0d., being the year's rent mentioned in the summons and plaint, the said plaintiff is indebted to the defendant in the said sum of £2. 8s. 1½d., for money paid by the defendant for the use of the plaintiff, at his request—that is to say, for poor-rate and rentcharge, to which the said Sir Charles C. W. Domvile, the plaintiff, was liable as landlord in respect of said premises; and the said defendant is willing to set off said last-mentioned sum against an equal amount of said rent; and, as to the sum of £1. 14s. 0d., being further portion of said sum of £61. 15s. 0d., the defendant says that, by indenture bearing date the 28th day of April 1836, Sir Compton Domvile, the father of the plaintiff, now deceased, demised the premises in the summons and plaint mentioned to one John Verschoyle, for a term still unexpired, at the yearly rent of £61. 15s. 0d., and that said lease was duly assigned to the defendant by indenture bearing date the 9th day of November 1861; and defendant now

To a plaint in ejectment for non-payment of rent alleging that one year's rent was due under a lease, the defendant pleaded that, by indenture, the father of the plaintiff demised the premises in the plaint mentioned to A, at a rent of £61. 15s. 0d. a-year; and that the said lease was duly assigned to the defendant, and that before the making of the said lease, a portion of the said premises, amounting to two roods and twenty-six perches, was, and thence hitherto hath remained, the absolute property in fee of B. The defence then averred that neither the lessor nor the plaintiff had, at the time of making the

lease, or since, any right or interest in the said portion of the premises, and that neither the lessee nor the defendant, nor any other person holding under the said demise, ever obtained any possession or enjoyment of the said portion, but that the same had always remained in the exclusive possession of B, and that the value of the said portion was £1. 14s. 0d. a-year; and the defence then averred tender of the residue of the rent.

Held, on demurrer, that this was a good defence, as it amounted to a plea of eviction by title paramount.

* This case, through mistake, was printed after the case of *The Irish Society v. Tyrrell* (*ante*, p. 249), which it ought to precede.

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holds under the said lease ; and that, at and before the making of said indenture of the 28th of April 1836, a portion of said premises, amounting to two roods and twenty-six perches, or thereabouts, was, and thence hitherto hath remained, the absolute property in fee of the Grand Canal Company ; and neither the said Sir Compton Domville nor the plaintiff had, at the time of the making of the said demise, or thence hitherto, any right or interest in said portion of said premises ; and neither the said John Verschoyle nor the defendant, nor any other person holding under said demise, has ever obtained any use, possession, or enjoyment of said premises, or any benefit or advantage therefrom ; but same has always, since the making of said demise, remained in the exclusive possession of said Grand Canal Company and their servants ; and defendant avers that said portion is worth annually the sum of £1. 14s. 0d. ; and, as to the residue of the said sum of £61. 15s. 0d., being the sum of £57. 12s. 10½d., the defendant says that, before the commencement of this action, on the 1st day of September 1864, he tendered said sum to the plaintiff, who, through his agents duly authorised in that behalf, refused to accept same ; and the defendant has been at all times ready and willing to pay said sum, and now brings the same into Court.

Demurrer thereto.*

The *Solicitor-General* and *O'Connor Morris*, in support of the demurrer.

Michael *Morris* and *Dillon*, in support of the pleadings.

O'Connor Morris.

This plea is bad ; it is an attempt on the part of a tenant,

* The following points were noted for argument :—That it appears from the said defence that the said Sir Compton Domville, in the said defence mentioned, by indenture demised the premises, in the said summons and plaint and the said defence mentioned, to the said John Verschoyle, in the said defence mentioned ; and that the said premises were afterwards assigned by the said John Verschoyle, by indenture, to the said James Ward, and that the said James Ward now holds the same under and by virtue of the said indentures ; and therefore that the said James Ward is *by law precluded and estopped* from averring, &c.—[The demurrer set out the averments in the defence *seriatim*.]

That the defence is doubly repugnant and self-contradictory, in admitting that the said Sir Compton Domville had a sufficient title in law to make the said demise, and then in stating facts which contravene such title, and are inconsistent with it.

who admits that he holds by indenture, to dispute his landlord's title in part of the demised premises, as that title stood at the time of making the demise. There is no principle of law better settled than this, that a lessee by indenture cannot question his lessor's title. The origin of this rule is to be traced to the first principles of our Common Law—to the relation of lord and tenant under the feudal system. Such was the fealty which the tenant owed to his lord, that a mere attempt to dispute the title of the latter caused a forfeiture. If this case had come before the Court in the days when the feudal system was in force, not only would the plea have been held bad, but the mere fact of putting it on the files of the Court would have operated as a forfeiture. The reason of the rule may be now lost, but the principle is established beyond question. In *Palmer v. Ekins* (a) the doctrine is laid down that a lessee by indenture cannot plead *nil habuit in tenementis*. In *Palmer v. Manning* (b), which was an action of covenant for rent, brought by the assignees of the lessor against the lessee, the same doctrine is broadly stated; and, at page 538, Lord Kenyon, C. J., says:—"When the parties to this lease executed it, the one was taken to be the lessor, the other as lessee; both of them executed the lease: now it is not pretended that there was not an incipient estoppel; if so, the estoppel must continue as long as the privity of estate continues." In *Cuthbertson v. Irving* (c) a lease had been made by a mortgagor in possession to the defendant; subsequently to the date of the lease, the mortgagor assigned the equity of redemption to the plaintiff; and rent had been paid under that lease by the lessee to the mortgagor up to the date of the assignment, and afterwards to the plaintiff. An action of covenant was brought for rent; and the declaration alleged that the reversion on that lease had come to and vested in the plaintiff. That allegation was traversed. And in argument it was objected that the lessor had no legal estate in the demised premises at the time of the making of the lease; and consequently that the plaintiff was not an assignee under the statute 32 H. 8, c. 34. But

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(a) 2 Lord Ray. Rep. 1550.

(b) 7 T. Rep. 537.

(c) 4 H. & N. 742; S. C., 6 H. & N. 135.

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it was held that the lessee was estopped from denying that the lessor had an estate in reversion, and that the reversion passed by the assignment to the plaintiff. And Martin, B., at page 754, says:—
“Upon consideration, we think the authorities show that the defendant is estopped from disputing that the lessor was seised of an estate in reversion, and as there are apt words in the assignment to convey a legal estate in fee in reversion to the plaintiff, the estoppel continues in his favour notwithstanding the assignment to him shows the want of title.” These cases establish that a lessee by indenture cannot in any way dispute the title of his lessor in the whole of the premises, as that title stood at the time of the execution of the indenture. Can there then be any difference between his disputing his landlord’s title in the whole of the premises and in a part? There can be none in principle, and there is no authority for such a distinction. It is the relation of lord and tenant which creates the estoppel; and the question is not as to the quantity of the land, but as to the right of the tenant to controvert the title of the lord at all. It fails therefore as a logical inference that a lessee, though he may not plead *nil habuit in tenementis*, may yet plead *nil habuit in parte tenementorum*.

But on the general rule two exceptions have been grafted. First; that although a tenant cannot dispute the title of his landlord as it was at the time of making the demise, yet he may show that the title has determined. Secondly; that if the tenant be actually ousted and evicted from the possession by a person having a legal and paramount title, he may plead the eviction; but he cannot set up a *jus tertii* at the time of the making of the demise: 1 *Wms. Saunders*, 204; *Co. Litt.* 148; *Taylor v. Zamira* (a); *Doe d. Bullen v. Mills* (b); *Stephenson v. Lombard* (c); *Delap v. Leonard* (a).

The next question is, is this plea equivalent to a plea of eviction by title paramount? By the latter plea the defendant says,—true it is I executed the lease; true it is I entered into possession; and I did everything that it was my duty as tenant to do; but

(a) 6 Taunt. 524.

(c) 2 East. 575.

(b) 4 N. & M. 25.

(d) 5 Ir. Law Rep. 287.

a third person who had a legal and paramount title has actually ousted and evicted me out of the possession of the premises. How can the plea in the present case, which denies the title of the landlord altogether, be said to be equivalent to that? To constitute an eviction there must be an actual ouster from the possession. In *Neale v. M'Kenzie* (a), at page 95, Parke, B., says:—"Here the plaintiff never entered into the eight acres of land; and can there be an eviction from that of which the party never was in possession?" He cited *Hunt v. Coke* (b).

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Dillon, and M. Morris.

Estoppel between landlord and tenant is founded, not upon the execution of the indenture, but on the fact of the tenant going into the possession and enjoyment of the demised premises. In *Cuthbertson v. Irving* (c), Martin, B., speaking of estoppel between landlord and tenant, says:—"This state of law in reality tends to maintain right and justice, and the enforcement of the contracts which men enter into with each other (one of the great objects of all law); for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of his lessor, really is? All that is required of him is, that having received the full consideration for the contract he has entered into, he should on his part perform it." In *Hayne v. Maltby* (d), which was an action of covenant by the assignees of a patent for a machine, against the defendant, who had obtained permission from the plaintiffs to use one of the machines, and had covenanted that he would not use any of the patent machines other than the one he had permission from the plaintiff to use, and the action was brought for breach of that covenant; during the argument, the case of landlord and tenant was brought into the case by way of illustration, and Ashurst, J., says:—"This is not like the case of landlord and tenant; as long as the latter enjoys the estate, he shall not be permitted to deny his landlord's title, for he has a meritorious consideration; but

(a) 2 Cr. M. & B. 84.

(b) *Cuthbert's R.* 242.

(c) 4 H. & N. 758.

(d) 3 T. R. 438.

E. T. 1865. "when he is expelled by a person having a superior title, he may
Common Pleas. "plead it." And Buller, J., says:—"I think that the case of
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 "As long as the tenant holds under the lease, he is estopped from
 "denying his landlord's title; but when he is evicted he has a
 "right to show that he does not enjoy that which was the con-
 "sideration for his covenant to pay the rent, notwithstanding he
 "has bound himself by the covenant." In *Taylor on Evidence*,
 ss. 76, and following, the general law of estoppel will be found.—
 [CHRISTIAN, J. The only averment in the plaint here is that the
 lessor by indenture demised the premises to the assignor of the
 defendant: that of course imports that the indenture was executed
 by the lessor; but does it also import that it was executed by the
 lessee? In *The Irish Society v. Tyrrell* (a) we gave leave to amend
 the replication by adding an averment that the lease was executed
 by both parties.]—Strictly, that averment is not necessary. In
 1 *Wms. Saunders*, 291, in the notes to *Capell v. Vaughan*, it is
 said:—"There are some words of art, such as indenture, deed, or
 "writing obligatory, which of themselves import that the instru-
 "ment was sealed by the party, without an averment of sealing."—
 [CHRISTIAN, J., asked if the lease was in Court; and if it
 appeared that it was executed by the lessee.]—(It was admit-
 ted that the lease was executed by both parties, and the Court
 gave leave to amend at once by adding an averment that the
 indenture was executed by the lessee.)—The pleadings in this
 case differ from those in *The Irish Society v. Tyrrell*; in the
 latter case the tenant relied on the facts as constituting a suspension
 of the rent, here he sets up a case of apportionment. *M'Loughlin*
v. Craig (b) is exactly in point: the facts there were precisely the
 same as in this case; and they were held to amount to an eviction
 by title paramount. In *Neale v. M'Kenzie* (c) a replication to an
 avowry in replevin, setting up a state of facts exactly the same as
 the present, was held, on demurrer, to be a good answer to the

(a) *Ante*, p. 249.

(b) 7 Ir. Com. Law Rep. 117.

(c) 1 M. & W. 742.

avowry. He cited *Doe d. Vaughan v. Meyler* (a); *The Ecclesiastical Commissioners v. O'Connor* (b). E. T. 1865.
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The *Solicitor-General*, in reply.

Neale v. McKenzie is distinguishable from the present case;—there the second lease was by parol, here it is by indenture. In *M'Loughlin v. Craig* it does not appear that the cases which have been relied on by the plaintiff on the present occasion were cited to the Court.

He cited *Comyn's Dig.*, vol. 4 (A. 2), p. 192, 5th ed.; *Viner's Abridgment*, tit. *Estoppel*, iv., 1 & 2; *Walton v. Waterhouse* (c); *The Duchess of Kingston's case* (d); *Jarman's Conveyancing*, vol. 9, p. 366; *De Medina v. Norman* (e); *Lainson v. Tramere* (f); *Burnett v. Lynch* (g); *Carpenter v. Buller* (h).

Cur. adv. vult.

On this day the Court delivered judgment.

May 11.

O'HAGAN, J.

This was an action of ejectment for non-payment of rent; and the question for decision arises on the plaintiff's demurrer to the defendant's defence. I believe that, in the ultimate judgment, we shall be unanimous; but there is some difference amongst the Members of the Court, as to the grounds of that judgment; and it has been thought proper and reasonable, that they should severally state their views upon the legal principles which affect the case. I shall very briefly indicate my own.

The action is brought, in the ordinary form, to recover 24 acres and 7 perches of the lands of Ballyfermot, held by the defendant as tenant to the plaintiff, under a lease, at the yearly rent of £61. 15s.; and the summons and plaint alleges, that one year's rent, at that rate, was due and owing on the 25th of March 1864. The defendant pleads, by way of set-off, as to the sum of £2. 8s. 1½d., portion of the

(a) 2 M. & Sel. 276.

(b) 9 Ir. Com. Law Rep. 242.

(c) 2 Saund. Rep. 418.

(d) 2 Sm. L. C. 642.

(e) 9 M. & W. 820.

(f) 1 Ad. & Ell. 792.

(g) 5 B. & Cr. 589.

(h) 3 Y. & Jer. 423.

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sum of £61. 15s. 0d., claimed as due by the plaintiff, that the plaintiff is indebted to him in that amount, for money paid as poor-rate and rentcharge, and received to the plaintiff's use. And, as to the sum of £1. 14s. 0d., further portion of the sum of £61. 15s. 0d., the defendant pleads that, by indenture bearing date the 28th day of April 1836, Sir Compton Domvile, the father of the plaintiff, demised the premises in the summons and plaint mentioned to one John Verschoyle, for a term still unexpired, at the yearly rent of £61. 15s. 0d.; that the lease so made was assigned to the defendant by indenture bearing date the 9th day of November 1855, and that the defendant now holds under the lease. And then the defendant proceeds to aver that, at and before the making of the indenture of the 28th of April 1836, a portion of the premises, amounting to 2 roods and 26 perches, or thereabouts, was, and has thence remained, the absolute property in fee of the Grand Canal Company, and neither Sir Compton Domvile nor the plaintiff had, at the time of the making of the demise, or thence hitherto, any right or interest in that portion of the premises; and neither John Verschoyle, nor the defendant, nor any other person holding under the demise, has ever obtained any use, possession, or enjoyment of it, or any benefit or advantage from it; but it has always, since the making of the demise, remained in the exclusive possession of the Grand Canal Company or their servants. And the defendant further avers that the portion is worth annually the sum of £1. 14s. 0d.; and, as to the residue of the sum of £61. 15s. 0d., being the sum of £57. 12s. 10½d., the defendant alleges that he tendered that sum to the plaintiff, who, through his agents, declined to accept it. To this defence, the plaintiff has demurred, on the ground that, on the state of facts which it discloses, the defendant is by law precluded and estopped from averring that, at the time of the making of the indenture of demise, the portion of the premises amounting to 2 roods and 26 perches was then, and has since remained, the property of the Grand Canal Company; and from averring that neither Sir Compton Domvile nor the plaintiff had right or interest in that portion; or that neither John Verschoyle nor the defendant, nor any other person holding under the demise, had ever possession or enjoyment

of it; but that it has remained the property of the Grand Canal Company. The plaintiff demurs to the defence for duplicity and repugnancy. The latter ground of demurrer has been properly abandoned at the Bar; and the plaintiff has relied altogether on the estoppel, which, he insists, precludes the defendant, holding under a demise by indenture, from disputing the title of the lessor, or those deriving under him, to any portion of the premises demised.

The matter is of some nicety and importance; and we have been pressed by various considerations of inconvenience and hardship, on the one side and the other, for the purpose of affecting our determination on the legal rights of the respective parties. For the plaintiff, the *Solicitor-General* strongly urges, that, if we decide against him, we shall make it competent for a litigious tenant, in any case, to stay out of possession, and put his lessor on proof of title. And, for the defendant, *Mr. Dillon* urges still more strongly, that it would be monstrous to permit a lessor—who purports to demise that to which he has no title, to a tenant who never has had, and never can have, any possession of it or benefit from it—to recover the rent mistakenly reserved, for which the lessee has had no equivalent whatever. I take it to be the office of this Court to ascertain, so far as may be possible, the actual condition of the law, and to rule accordingly;—with satisfaction, if that condition be in accordance with natural equity, and true social interests; and, if it be not, with the hope that legislation may speedily rectify the wrong.

Dealt with on purely legal grounds, the argument stands thus:—The plaintiff, as I have said, relies on the alleged estoppel. The defendant answers in two several ways—first, he says there was no estoppel at all; but, secondly, if there was, and if it was ever so binding, the facts admitted on the record amount to an eviction by title paramount, or that which is equivalent to an eviction by title paramount; and, in that way, the effect of the estoppel is avoided, and the tenant is enabled to rely upon the real circumstances of the case, and to have substantial justice. And, accordingly, he lodges in Court the rent properly issuing from the land which he has enjoyed, and refuses to pay for that which he

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never enjoyed, and never could have enjoyed, notwithstanding the formal demise by indenture. In either of these views, the defendant must prevail upon this record. The first might relieve him from the payment of any rent whatever ; but this he does not seek ; and we have only to do with the small sum in dispute, as the value of the bit of land which never came to his possession. The second, relying on an eviction by title paramount, justifies the apportionment of the rent in accordance with the enjoyment of the premises.

On the first point urged by the defendant my opinion is with the plaintiff. I think that, if there were nothing else in the case, the indenture which must now be taken, upon the amendment authorised by the Court, to have been executed by both parties, and under which, *ex concessis*, no interest in the portion of the land vested in the Canal Company ever passed, was binding upon them, by way of estoppel. The principle is stated in *Shepherd's Touchstone*, 51 :—
“If a lease be by indenture, both parties are concluded to say that “the lessor had nothing in the land at the time of the lease made.” To the same effect is *Co. Lit.*, 43 *b*, the passage cited from *Comyns's Digest*, and *Viner*, the cases of *Palmer v. Eakins (a)*, *Parker v. Manning (b)*, *Cuthbertson v. Irving (c)*, and other cases with which we are familiar. I do not think it necessary to occupy time by going through them ; they will be found collected in *Furlong's Landlord and Tenant*, p. 448, and 2 *Wms. Saund.*, p. 418. Upon these authorities, and that of the case of *M'Loughlin v. Craig*, in the Court of Queen's Bench, to which I shall have occasion more particularly to refer on the second branch of the argument, and which appears to me a distinct ruling on both its branches, in support of the views I have adopted, I am disposed to hold with the plaintiff that, on the execution of the indenture, it took effect by way of estoppel. I do not think that the argument of the *Solicitor-General* and Mr. *O'Connor Morris* has been satisfactorily answered at the Bar ; and any hesitation I have now, as to this question, has arisen from the knowledge that there is a difference of opinion upon it amongst my Brethren, who, in another case standing for judgment,

(a) 2 Lord Ray. 1550.

(b) 7 T. R. 537.

(c) 4 H. & N. 742 ; S. C., 6 H. & N. 133.

have heard, I understand, able and elaborate reasoning on the same point, of which I have not had the benefit in reaching my own conclusion.

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But, assuming the existence of the estoppel asserted by the plaintiff, the next question arises, is there, in the case, anything amounting to or in the nature of an eviction by title paramount? for, if there be, notwithstanding the demise by indenture, the defendant should not be held liable for more than the apportioned rent. The doctrine is thus laid down by Lord Abinger, in *Neale v. Mackenzie* (a):—"The principle upon which eviction is a defence is this, that rent issues out of the land, and is to be paid out of the profits; and, if the land be taken away, the rent is discharged." And for this he cites *Flood v. Thompson* (b) and *Co. Litt.*, 292 b; and then he proceeds to say, as to the particular case:—"If the lessee had entered into the whole, and been evicted the instant after by the tortious act of the lessor, or by an older title, from part, and kept out till the rent was due, the rent would either have been entirely satisfied or proportionably diminished; and we cannot see that there is any difference between such a case and one in which the lessee never did get possession of the whole, but was kept out of part from the very commencement of the lease until the rent-day. In each case, the lessee has been deprived of the profits; and, therefore, in each he should be exonerated, either altogether or in part, from the payment of the rent." This seems a view entirely consistent with common sense and common honesty; and, though it was afterwards held not applicable to the precise circumstances of *Neale v. Mackenzie* by the Court of Error (c), they are very distinguishable from the circumstances we are now considering: and the same view was fully adopted, in the case of *M'Loughlin v. Craig* (d), by the Irish Court of Queen's Bench, on a state of facts similar to that which is before us, and differing from it, if at all, only in a way to render the application of that view more fit and proper, in the latter. That case, like this, came

(a) 2 C. M. & R. 100.

(b) 1 Roll. Rep. 198.

(c) 1 M. & W. 758, Lord Denman's judgment.

(d) 7 Ir. Com. Law Rep. 117; S. C., 1 Ir. Jur., N. S. 328.

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before the Court upon demurrer. It was an action for rent, and not an ejectment; but this cannot affect the result of the decision. The summons and plaint relied on a demise by indenture, reserving rent from the premises of which the defendant, as in this case, was the assignee. The defendant pleaded, as to a part of the rent demanded, that, *before and at the time of the making of the indenture*, one Matilda M'Loughlin was, and still continued, in possession of a portion of the premises, and that the lessors and the lessee had brought an ejectment against her, in which she recovered judgment, and that neither the lessee nor his assignee had ever had any possession or enjoyment of that portion. The Chief Justice, upon this condition of facts, put the question thus:—"Are the matters stated "on the defence, by which the defendant says he was disabled "from getting possession of the lands equivalent to an eviction by "title paramount? That is, has enough been shown to satisfy the "Court that the lessee was prevented, by title paramount in Matilda "M'Loughlin, from getting possession of the entire of the land demised by the lease?" And the decision was in the affirmative. The defence was held good, and the rent was apportioned. Now, between that case and this there are only two circumstances of difference. There, the plaintiff objected that the defence made no averment of title in Maria M'Loughlin necessarily inconsistent with, or paramount to, the title of the lessor or the lessee, under the indenture. It was said that, consistently with her case, she might have a mere possessory interest, or she might be in possession as a tenant under the plaintiff or the defendant. In the case before the Court, no such difficulty arises; for the defence avers, and the demurrer admits, that the Canal Company have, and had before the execution of the lease, the absolute property in fee in the portion of the premises as to which the controversy arises. That was the difficulty which really induced, not the dissent, but the doubt of Mr. Justice Crampton, as to the correctness of a judgment in which he concurs with Chief Justice Lefroy, Mr. Justice Perrin, and Mr. Justice Moore. And, therefore, the present case is *a fortiori*, and has the element which was wanting in *M'Loughlin v. Craig*. The second point of difference is this, that, in *M'Loughlin v. Craig*, an

ejectment had been unnecessarily brought by the lessor and lessee against Maria M'Loughlin; and no proceeding of the sort, or any other, to recover possession of the premises in the hands of the Canal Company, is alleged to have been taken by anyone. But, it does not appear to me that this difference substantially affects the argument. Upon the pleadings, it must be taken that the Grand Canal Company had and have an irrefragable title; that their possession could not have been displaced, and that any attempt to disturb it must have been wholly futile and vain. I adopt the reasoning of the defendant's Counsel, that the eviction on which he relies to get rid of the estoppel was in fact as complete, in a legal sense, as if he had foolishly commenced an ejectment with the perfect assurance of a foreseen failure. In my mind, therefore, the case of *M'Loughlin v. Craig* is a distinct and express authority upon the very question at present in dispute. It is entirely inconsistent with the argument for the plaintiff, as to the effect of the estoppel, which, in really identical circumstances, it recognised and avoided by the eviction; and it answers the *Solicitor-General's* assertion that title paramount, to avail the defendant, must be taken to acknowledge the lessor's title at the date of the execution of the indenture of demise; which is also encountered by the doctrine of 1 *Wms. Saund.*, 181 *a*, n. 10. Even if I saw reason to question the soundness of such a decision by the Court of Queen's Bench, I should not be disposed to join in overruling it, in the absence of any adverse judgment by an appellate tribunal. But, although it has been somewhat lightly dealt with at the Bar, I think its authority has not been shaken. It is, to some extent, sustained by the decision in *Doe v. Meyler (a)*, in which a tenant for life made a demise of lands, of a portion of which he was seised in fee, and of another portion for life, with a power to lease. The lease was executed according to the power; and after the death of the lessor, it was held, that the lease was good for the lands in fee, but not for the other lands; and that the tenant should pay rent, properly apportioned, for the part which the lessor had effectually demised. In the same way, the principles affirmed by

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(a) 2 M. & N. 276.

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enable us to do right between the parties, in the present case; and I do not think we should be astute to question them, from any excessive anxiety to act on old feudal doctrines, which the Legislature has sought to discountenance, when dealing with the relations of landlord and tenant, in the changed circumstances of our modern society; and which should be applied so long as they have strictly and coercively the force of law, but not for a moment longer. In overruling the plaintiff's demurrer, we deny him only that to which he has no equitable title, and give the defendant immunity from a claim for the rent of land which he never has possessed: and I adopt the words of the Lord Chief Justice, in *M'Loughlin v. Craig*:—"That it is the justice of the case; and it is always gratifying to find that the justice of the case can be brought out consistently with an adherence to the principles of law. It would be monstrous to say that the landlord should get the whole rent, when, by his default, the tenant only enjoys a part; and, on the other hand, it is but justice to the landlord that the tenant should say, 'I will pay you an equivalent for the quantity I actually hold.'" And that is precisely what the tenant has fairly said in the case before us.

For the reasons I have indicated, I am of opinion that the demurrer should be overruled, and judgment given for the defendant.

CHRISTIAN, J., concurred; but said that the grounds on which he did so were materially different from those stated by Mr. Justice O'HAGAN in his judgment; but that he would postpone stating the reasons why he concurred in the decision of the Court, until he came to give judgment in the case of *The Irish Society v. Tyrrell*.

KEOGH, J., concurred.

MONAHAN, C. J., concurred.

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ARCHBOLD v. THE EARL OF HOWTH.*

Nov. 9, 10,
 11, 22.

DEMURRER.—The first paragraph of the summons and plaint stated, that heretofore, to wit, on the 30th day of November 1857, the defendant agreed to demise, and the plaintiff agreed to take, a certain farm and lands, being part of the lands of Tyrrellstown, situate in the county of Dublin, containing 87a. 3r. 33p., Irish plantation measure, or thereabouts, and then in the possession of the plaintiff, for the term of twenty-one years, from the 29th of September 1857, at a yearly rent, to be ascertained by adding £20 per cent. to the then present rent of the said farm, to wit, at the yearly rent of £133. 10s. 0d.; and the said defendant agreed to grant, and the plaintiff agreed to accept, a lease in possession of the said lands, for the term and at the rent aforesaid, containing the clauses usual in the defendant's leases, and to execute a lease accordingly; and the plaintiff avers that he has been always ready and willing to perform the said contract on his part; and that all conditions have been performed, and all times elapsed, and all things happened necessary to entitle the plaintiff to a performance of the said agreement by the defendant, and to maintain this action for the breach thereof; yet the defendant did not perform the said agreement on his part, but on the contrary refused so to do, and during the continuance of the said term ejected and expelled the plaintiff from the possession of the said farm, and demised the said farm in possession to one William Arthur, for a term which is

To a count in contract for not granting a lease in pursuance of an agreement, averring readiness and willingness on the part of the plaintiff to perform the contract, the defendant pleaded that the plaintiff was not always ready and willing to perform the contract on his part. The plaint contained other counts for false representation and fraudulent concealment by the defendant, of the existence of the said agreement, by reason whereof the plaintiff had permitted judgment to go by default in an action of ejectment, brought to recover the possession of the lands, the subject of the

agreement, of which the plaintiff was tenant from year to year to the defendant.

Replication.—That the defendant ought not to be permitted to plead the defence, because the plaintiff says, that his not being ready and willing in that behalf arose from and was occasioned by the circumstances of false and fraudulent representation and concealment on the defendant's part, and of ignorance of the said agreement and his rights thereunder on the plaintiff's part, as particularly set forth in the second, third and fourth counts of the said plaint.

Held, on demurrer, that the replication was bad, both as a replication by way of estoppel and as a departure.

Held also, that the averment of readiness and willingness in the first count was a traversable averment; and therefore that the plea was good.

* Before MONAHAN, C. J., KEOGH and CHRISTIAN, JJ.

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still subsisting, which said William Arthur has ever since kept the plaintiff out of possession of the said farm, by reason whereof the plaintiff has lost the benefit of the said contract, and been deprived of the possession of the said farm, and of four acres of wheat and two acres of vetches 'growing on the said lands; and was obliged to dispose of his stock and effects at a sacrifice; and was deprived of the benefit of the labour which he had expended in preparing eight acres of the said farm for tillage; and has been otherwise injured.

The second paragraph stated,—that before the time of the making the false representation hereinafter complained of, the plaintiff was tenant from year to year to the defendant, at the yearly rent of £132, of the premises in the first count mentioned, and was entitled to the benefit of the executory contract for such lease thereof as in the first count set forth; and the plaintiff avers that, before the time of making said false representation, the defendant had duly determined the said yearly tenancy by service of a notice to quit, and brought an ejectment for the recovery of the said premises, upon such notice to quit, in one of Her Majesty's Superior Courts of Law at Dublin, and had recovered judgment by default thereon, and upon such judgment had evicted and expelled the plaintiff from the possession of the said farm. And the plaintiff avers that, at the time of the making of the said false representation, the said executory contract was in full force and effect; and the defendant had knowledge of the existence of the said executory contract for a lease; of the existence in fact of which contract the plaintiff was then, and up to the time of making the demise hereinafter mentioned, wholly ignorant, as the defendant during all the time aforesaid well knew; yet the defendant falsely and fraudulently, and in order to enable the defendant to demise the said lands at an increased rent, discharged from the said executory agreement, to a lessee other than the plaintiff, represented to the plaintiff, and caused the plaintiff to believe that no agreement for a lease of the said lands between the plaintiff and the defendant existed in fact; by reason whereof the plaintiff was prevented from taking proceedings to enforce the said contract: and the defendant thereupon demised the said premises

at an increased rent to one William Arthur, who, at the time of such demise had no notice of the said contract, and who thereupon took and now holds the said lands discharged from such executory contract, and the estate and interest of the said plaintiff under the said contract has been lost; and the plaintiff says that, by reason of such the acts of the defendant, he has also sustained the special damage in the first count mentioned.

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The third count was substantially the same as the second, from which it differed only in the averment that the false representations were made after the service of the notice to quit, but before the ejectment.

The fourth count was for wilfully and fraudulently concealing from the plaintiff that the executory contract for a lease mentioned in the first count was in full force and effect.

Third plea to the first paragraph of the summons and plaint.—That the plaintiff has not always been ready and willing to perform the said contract on his part; and that long before the said demise to the said William Arthur, the plaintiff was not ready and willing to perform the said contract on his part.

Replication.—That the defendant ought not to be permitted to aver that the plaintiff was not, up to the making of the said demise in the said first count mentioned, ready and willing to perform said contract on his part as a bar to the cause of action in the said first count alleged, because, the plaintiff says, that the plaintiff's not being ready and willing in that behalf arose from and was occasioned by the circumstances of false and fraudulent representation and concealment on the defendant's part, and of ignorance of the said agreement and his rights thereunder on the plaintiff's part, as particularly set forth in the second, third and fourth counts of the said plaint.

Demurrer thereto.*

* The following points were noted for argument: First—That the replication is a departure in pleading from the first count of the plaint, inasmuch as the plaintiff in the first count of the plaint avers that he has been always ready and willing to perform the said contract; and by the said replication avers that he was not always ready and willing to perform the said contract.

Second—That the plaint contains a distinct and positive averment that the

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Macdonogh and *J. H. Monahan*, in support of the demurrer, cited *Sweeny v. The Promoter Life Assurance Company* (a); *Cutler v. Southern* (b); *Brine v. The Great Western Railway Co.* (c); *Bartlett v. Wells* (d); *De Roo v. Forster* (e); *Cutter v. Powell* (f); *De Medina v. Norman* (g); *Stray v. Russell* (h); *Cort v. The Ambergate Railway Co.* (i); *Lovelock v. Franklyn* (k); *Jackson v. Allaway* (l); *Boyd v. Lett* (m); *Manby v. Cremonini* (n); *Bentley v. Dawes* (o); *Co. Litt.* 304 a; 1 *Chitty's Pl.*, 5th ed., p. 683; 2 *Wms. Saunders*, p. 188; *Stephens' Pl.*, p. 229; *Taylor on Evidence*, ss. 76, 79, 85.

Sergeant *Armstrong*, *Jellett* and *Palles*, in support of the replication, cited *Bodell v. Parsons* (p); *Ford v. Tiley* (q); *Fell v. Casanet* (r); *Schrenspurger v. Anderson* (s); *Philpott v. Maclure* (t); *Ripley v. Maclure* (u); *Hochster v. De La Tour* (v);

(a) 14 Ir. Com. Law Rep. 476.

(b) 1 Saund. Rep. 116.

(c) 2 B. & Sm. 402.

(d) 1 B. & Sm. 836; S. C., 31 L. J., N. S., Q. B. 57.

(e) 12 C. B., N. S. 272.

(f) 2 Sm. L. C. 1.

(g) 9 M. & W. 820.

(h) 1 Ell. & Ell. 888.

(i) 17 Q. B. 127.

(k) 8 Q. B. 371.

(j) 6 M. & Gr. 942.

(m) 1 C. B. 222.

(n) 6 Exch. 808.

(o) 9 Exch. 666.

(p) 10 East. 1059.

(q) 6 B. & Cr. 325.

(r) 4 M. & Gr. 898.

(s) 3 Exch. 158.

(t) 5 M. & W. 475.

(u) 4 Exch. 345.

(v) 2 Ell. & Bl. 678.

plaintiff has always been ready and willing to perform the said contract; and the replication, admitting that the plaintiff had not always been ready and willing, seeks to excuse the absence of such readiness and willingness.

Third—That the first count of the plaint being in contract, the replication seeks to convert the case into an action of tort.

Fourth—That the said replication discloses no legal ground why the defendant ought not to be permitted to aver that the plaintiff was not, up to the demise in the first count mentioned, ready and willing to perform said contract, as a bar to the cause of action in the first count, inasmuch as it does not appear that the defendant ever, either by words, acts or conduct, represented that the plaintiff was in fact ready and willing.

London Dock Co. v. Sinnott (a); *Short v. Stone* (b); *Sugden's Vendors and Purchasers*, 11th ed., pp. 260-1; *Broom's Legal Maxims*, p. 285.

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Cur. ad. vult.

On this day the judgment of the Court was delivered by
MONAHAN, C. J.

Nov. 22.

The declaration in this case contains four counts; the first is a count in contract, alleging that the defendant agreed to demise, and the plaintiff agreed to take, a certain farm from the defendant, at a certain rent; and that the defendant had agreed to grant, and the plaintiff to take, a lease of the said farm; and the count then contains an averment that the plaintiff was always ready and willing to perform the said contract on his part, but that the defendant refused to perform his part of the agreement. The first count is as follows.—[His Lordship read the first count.]—The second and third counts are in case, alleging that such a contract as is mentioned in the first did in fact exist; and that, while the said contract was in existence, Lord Howth falsely and fraudulently represented to the plaintiff that no agreement for a lease between the plaintiff and defendant existed in fact; and the plaintiff says that by reason of such false representations he was prevented from taking proceedings to enforce the said contract, and that the benefit of the said contract has been lost to him; and he claims damages in relation thereto. Several pleas have been filed to these counts; but the case comes before us on a short plea to the first count. That plea is as follows:—"That the plaintiff has not always been ready and willing to perform the said contract on his part; and that long before the said demise to the said William Arthur, the plaintiff was not ready and willing to perform the said contract on his part." In other words, it is a traverse in terms of the averment in the first count of the declaration, that the plaintiff was always ready and willing to perform on his part the contract alleged in the declaration. To

(a) 8 Ell. & Bl. 347.

(b) 8 Q. B. 358.

M. T. 1864. that plea a replication was filed in the following terms.—[His
Common Pleas. Lordship read the replication.]—In other words, admitting the
ARCHBOLD facts stated in the plea to be true, yet that the defendant is not
v. to be allowed to rely on them as a defence to the first count.
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The case was argued at considerable length, and on the part of the plaintiff the argument was strongly pressed, that, in point of fact, the averment of readiness and willingness to perform the contract contained in the first count was an unnecessary averment, and being so, that of course it was not traversable; so that the traverse of it would not be a bar to the maintenance of the action; and we were referred to some authorities in support of that argument: but upon this branch of the case the law is so elementary, that it is unnecessary to go into the case at any length. It was not questioned that, if a contract is entered into which requires mutual acts to be done for the performance of it, either party suing for the breach of that contract must allege readiness and willingness to perform his part of the contract; and that is a necessary averment to entitle the plaintiff to maintain his action. The meaning of the averment in the plaint is this:—"Before you (the defendant) refused to perform your part of the contract, and before the cause of action arose, I was ready and willing to perform my part of it; and that being so, and you having then refused to perform your part of the contract, I have a right to maintain an action for the breach of it." It was conceded that, where mutual acts were to be done, the averment was necessary; but then it was said, that, there being an allegation that Lord Howth had given a lease of this farm to a third person, and thereby disabled himself from performing his part of the contract, the averment of readiness and willingness on the part of the plaintiff became unnecessary: and cases were cited to show that, where the performance of a condition precedent was necessary to sustain an action, as for instance the tender of a lease, if the landlord had disabled himself from executing the lease, the absolute tender of the lease was unnecessary, because common sense does not require the performance of that which is merely a useless

form. And so in this case, with regard to the count for breach of agreement, it is said that it was not necessary to go through the form of tendering the lease for execution. But it is a different matter where the action is brought for breach of contract before the inability of the party to perform the contract arises; and in this case it is only necessary to read the declaration, to see the meaning of the first count; it is this:—"You (the defendant) and I (the plaintiff) entered into an agreement, you to give, and I to take a lease; I was always ready and willing to take the lease, but although I was so, you refused to perform the contract on your part; and having refused to give me the lease, you did other acts, that is to say, you evicted me and you leased the farm to a third person." The substantial cause of action is the refusal to perform the contract; and the averment of readiness and willingness on the part of the plaintiff to perform his part of the agreement is a necessary averment; and, being so, the defendant is at liberty to traverse it. But then it was said (and Sergeant *Armstrong* pressed this argument with much force) that the words of the defence are unnecessarily precise, for that the words of the plaintiff are,—“That the plaintiff has been always ready and willing to perform the contract on his part,” and the traverse of that is too narrow and precise, by limiting the period during which the plaintiff’s non-readiness and non-willingness existed to the time previous to the demise to Arthur.

Now, in order to ascertain what is the fair meaning of this traverse, and what issue it would be the duty of a Judge to direct on it, upon settling the issues on this record, I think it would be desirable to consider what proof it would be necessary for the plaintiff to bring forward in order to succeed upon it. Sergeant *Armstrong* contends that it would be necessary for him to show that, for every moment from the time of entering into this agreement to the making of the lease to Arthur, there was a continuous readiness and willingness on his part to perform the contract. If that were so, I agree with Sergeant *Armstrong* in his objection to this defence. But that is not the meaning of this traverse. To

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succeed upon it, all the plaintiff would have to prove would be, that there was an honest, *bona fide*, and substantial readiness and willingness on his part to perform the contract. There must not have been such an absence of readiness and willingness on his part as might have induced the defendant to believe that he had abandoned the contract. He cannot act in that way, and then turn round and bring an action for an express refusal to perform the contract.

The only case to which I shall refer is *Cort v. The Ambergate Railway Company* (a). That was an action brought against a railway company for not accepting certain railway chairs, which were to be supplied according to a specification. It turned out that the railway company were unable to complete their undertaking; and part of the line was abandoned. After the plaintiffs had supplied a number of the chairs, in pursuance of the contract, the company directed them to stop making the chairs, as they did not require any more of them. The plaintiffs brought an action for non-performance of the contract, which they averred they were ready and willing on their part to perform, though the time limited for performing the contract had elapsed; and there was an express refusal on the part of the company to take any more of the chairs; and the plaintiffs had ceased to manufacture them altogether. The defendants pleaded, as the defendant has done here, that the plaintiffs were not ready and willing to perform the contract *in modo et formâ*. The case was tried before Mr. Justice Coleridge; and on the argument it never occurred to anyone to suggest that the averment was immaterial. The fact was, that the plaintiffs were not ready and willing to deliver the chairs, for they had never made them; but the defendants insisted that, to entitle the plaintiffs to recover on the issue on that averment, they should have made and tendered the residue of the chairs. But the Court held that the meaning of the averment was, that there was a *bona fide* readiness and willingness on the part of the plaintiffs to perform their part of the contract, if the defendants had performed it on their part. But when it became certain that the railway company would

(a) 17 Q. B. 127.

not perform their part of the contract, it was unnecessary for the plaintiffs to go through the form of manufacturing and tendering the chairs. And Lord Campbell, in delivering judgment, says:—"In common sense, the meaning of such an averment of "readiness and willingness must be, that the non-completion of "the contract was not the fault of the plaintiffs, and that they "were disposed and able to complete it if it had not been renounced "by the defendants. What more can be reasonably required by "the parties for whom the goods are to be manufactured?" So here, the averment, without which the plaintiff could not maintain the action, is, that he was disposed to perform the contract on his part, and able and willing to do so, if he had not been prevented by Lord Howth making the lease to Arthur. We think that will be the question at the trial, and that Archbold will not be deprived of the benefit of this contract by Lord Howth showing that, at any particular moment of time before the making of the lease to Arthur, there was not an absolute readiness and willingness on his part to perform it. The sole question will be, from whose fault did the non-completion of the contract arise? We are therefore of opinion that the defence is good; and that being so, the only question which remains is, whether it is answered by the replication?

The replication is in form a replication by way of estoppel; the effect of it is this, that Lord Howth should not be permitted to plead this defence, because the non-readiness and non-willingness on the part of the plaintiff occurred through the fault of Lord Howth himself, and by reason of his false representations and fraudulent concealment; and that, because Lord Howth was guilty of this misconduct, he is not now entitled to rely on the want of readiness and willingness on the part of the plaintiff to perform this contract.

During the argument on the abstract question of estoppel, no case was referred to at all similar to the present; all the authorities which were cited were cases where the party by acts or conduct represented a particular state of things to exist; and, having done so, he was not afterwards permitted to aver con-

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trary to that particular state of things. If the representation be that a particular state of things exists, the estoppel works against the party making it, and is evidence against him, and may be used to prevent him relying on a different state of things from what he has represented. The only argument offered on this branch of the case was, that no one can take advantage of his own wrong. There is no doubt that there is a general rule of law to that effect; and no one questions but that Lord Howth cannot, in this case, take advantage of his own wrong; and, if he has been guilty of these wrongful representations, the law has provided appropriate remedies; and I see that in this declaration there are counts in which damages are claimed for those very representations. It occurs to us that it would be pushing the doctrine of estoppel further than, and in a different way from that in which, it has ever been applied, if we should hold that it is applicable to the present case.

The only other question is this—assuming the replication bad, as a replication by way of estoppel, can it be supported on other grounds? I think it is not only bad as an estoppel, but bad as a departure. In my opinion, this replication varies the cause of action declared on in the first paragraph of the summons and plaint, and that it raises a new state of facts for which (if they afford a cause of action) there are appropriate remedies, the benefit of which the plaintiff will get by the other counts in his declaration.

On these grounds I think the demurrer should be allowed.

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Jan. 24, 26.
 Feb. 2.

THIS was an action of trover and detinue. The defence traversed both counts. The action was tried before the LORD CHIEF BARON, at the Sittings after Hilary Term 1864. It was proved that, upon the 17th of March 1863, the plaintiff, a sewed-muslin manufacturer in Belfast, delivered a parcel to the booking-clerk at the Belfast station of the Belfast Junction Railway Company. The parcel was directed to his agent in Virginia, as follows:—"Mr. Patrick M'Bride, Virginia, per rail to Drogheda, thence per mail-car to Virginia." The plaintiff paid the carriage of the parcel to Drogheda. A mail-car runs daily from Drogheda to Virginia. A railway belonging to the Dublin and Drogheda Railway Company runs from Drogheda to Kells. Previous to March 1863 the defendant had run a car (but not a mail-car) from Kells to Virginia; and up to the close of 1861 the plaintiff's parcels were forwarded to Virginia, to M'Bride. Upon the opening of the line to the Virginia road station, on the 18th of March 1863, the defendant, for the first time, ran his car from that station to Virginia, in correspondence with the trains on the Kells railway. In 1862 the plaintiffs informed the manager of the Dublin and Drogheda Railway Company at Drogheda, the station-master at Kells, and the defendant, that he directed his parcels to M'Bride, to be forwarded as they were directed from Drogheda, "per mail-car to Virginia." The carriage

A sent a parcel from Belfast, by the Belfast Junction Railway Company, to Drogheda, carriage paid, directed "Mr. Patrick M'Bride, Virginia, per rail to Drogheda, thence per mail-car to Virginia." B, a common carrier, conveyed parcels from Kells station, on the Drogheda and Kells railway line, to Virginia. Notwithstanding cautions from A to both the Kells Railway Company and to B, not to convey parcels directed as above, the Kells Railway Company and B persisted in conveying to Virginia parcels addressed as above by A.

Upon the refusal of A to pay for, and

refusal of B to deliver to him, a parcel brought to Virginia *via* Kells, and thence per B's car—*Held*, that it was not the duty of B, as a common carrier, to convey the parcels in question; that B had no lien upon the parcel for its carriage, as the direction upon the parcel, and the cautions given to him by A, constituted express notice by A that his parcels should not be carried by that route. B was in the position of an innkeeper, receiving the horses of a guest of which he knows the guest is not the owner.

The Dublin and Belfast Junction Railway Company were the agents of A for a specific purpose, *viz.*, to forward the parcel by the route directed. Therefore, there was no privity between A and B relative to the carriage of the parcel.

H. T. 1865. by the latter route was cheaper by sixpence than *viâ* rail to Exchequer. Kells, and thence per car to Virginia; and M'Bride had arranged for the carriage of his parcels with the driver of the mail-car. WAUGH Several parcels were delivered to M'Bride, *viâ* Kells and defendant's v. car, in 1861 and 1862. M'Bride told the defendant that if he persisted in bringing parcels by his car when directed by another route, he would not pay for them, and that he would see what the law could do to prevent him interfering with his parcels. The defendant said that "his car was for that purpose, and that he would bring as many parcels as he could get." The Drogheda Railway Company paid the defendant 12s. 6d. per week for running his car from Virginia-road station to Virginia. M'Bride received the invoice of the parcel in question on the 19th of March, but did not hear of the arrival of the parcel in Virginia until the 27th of March. Upon inquiring for it at the defendant's car-office, the defendant refused to give it to M'Bride unless he paid one shilling for the carriage. M'Bride refused to do so. It was proved that the clerk of the Drogheda and Kells Railway Company handed the parcel to the defendant at Kells. M'Bride on several occasions paid, under protest, for parcels brought by the defendant to Virginia. It was alleged by the defendant that, in the months of January and February 1863, M'Bride received from the defendant, and paid for, two parcels, and made an objection at the time. The evidence as to the payment by M'Bride for these parcels was conflicting and unsatisfactory, as it appeared that M'Bride's parcels were brought to him from the defendant's office by boys who made it a trade to carry off parcels to those to whom they might be directed; and on receiving payment they paid the carriage at the car-office.

At the close of the case, his Lordship left the following questions to the jury:—

1—Did M'Bride, on behalf of the plaintiff, before the sending of the parcel in question, direct the defendant not to bring parcels sent and addressed (as the parcel in question was) to M'Bride? Yes. If so—

2—Did the plaintiff, or M'Bride on his behalf, withdraw that direction before the sending of the parcel in question? Yes. If so—

3—When and how was such direction withdrawn? In January and February 1863, by receiving parcels without objection, and paying for them.

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4—Was a similar direction given to the Kells Railway Company before the sending of the parcel in question? Yes.

Upon these findings his Lordship directed a verdict for the plaintiff. The jury found the value of the goods to be £7. 9s. 3d. At his Lordship's suggestion the goods were given up to the plaintiff; and the damages were reduced to £3. 14s. 7d., that being admitted to be the amount of deterioration that they had suffered; without prejudice to his Lordship's power to certify for costs, as if the amount of the damages had been unaltered. Leave was also reserved to move to enter a verdict for the defendant. A conditional order, pursuant to such leave, having been obtained by the defendant—

Sergeant *Armstrong* (with whom were *R. Dowse* and *H. Devitt*) showed cause.

There is no evidence to show that the defendant was a common carrier, and had a lien upon the plaintiff's goods for their carriage. But, admitting that the defendant was a common carrier, he had no lien for carriage upon goods conveyed by him in direct opposition to written directions upon the goods that he was not to carry them. The direction upon the goods was evidence that the order of M'Bride as to the route of the goods was not rescinded. Payment, under protest, by the defendant, of the carriage of some of the parcels, is no evidence of concurrence in the defendant's conduct: *Angell on Carriers*, p. 355; *Hiscox v. Greenwood* (a); *Madden v. Kempster* (b); *Lempriere v. Pasley* (c); *Scothorn v. The South Staffordshire Railway Co.* (d).

W. J. Sidney and *Osborne*, contra.

The defendant was justified in taking the goods from the railway Company at Kells or Virginia-road station, notwithstanding

(a) 4 Esp. 174.

(b) 1 Camp. 12.

(c) 2 T. Rep. 485.

(d) 8 Exch. 341.

H. T. 1865. *M'Bride's* caution not to do so. As a common carrier his lien for carriage accrued upon them the instant they were delivered to him. The fact that the Railway Company were not the owners of the goods made no difference: *Powell on Carriers*, p. 196; *York v. Greenaugh* (a); *Johnson v. Hill* (b); 2 *Stephens' Blackstone*, p. 83; *Cross on Lien*, p. 28.

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PIGOT, C. B.

Feb. 2. It is unnecessary to recapitulate all the facts of this case, which was argued a few days ago.

The defendant seeks to enter, in pursuance of the leave reserved at the trial, a verdict for him, upon two grounds—first, that he is entitled so to do, irrespectively of the finding of the jury, that the directions to the defendant not to bring the parcels were withdrawn; secondly, that he is entitled to have such verdict entered for him upon that finding.

As to the first ground, the defendant's Counsel contend that the defendant received the parcel as a common carrier; that he was bound so to receive it, and to carry it, as a common carrier; and that, correlative to that obligation, he had a right to a lien for the charge of the carriage, and therefore was entitled to detain the parcel until the amount of that charge should have been paid.

I think the defendant, upon the uncontroverted evidence, was plainly a common carrier when he received the parcel, and brought it from Virginia-road, or from Kells, to Virginia. Whether he took charge of it at Kells station, when he there paid the agent of the Drogheda and Kells Railway sixpence for the fare of the parcel from Drogheda to Kells, or at Virginia-road station, from which, on the day he received the parcel, his car for the first time ran (not from Kells, but from Virginia-road station, to Virginia), is immaterial.

The defendant's Counsel then insisted that the defendant, as a common carrier, was bound to receive the parcel from the Drogheda and Kells Railway Company, wholly irrespectively of who the owner was, or of what the owner had previously done

(a) 2 Lord Ray. 867.

(b) 3 Stark. N. P. 172.

in reference to the parcel, and consequently to detain it for the fare; and they relied on the case of *The Exeter Carrier*, cited by Lord Holt, in *York v. Greenaugh (a)*. In that case, "A stole goods, and delivered them to the Exeter Carrier, to be carried to Exeter. The right owner, finding the goods in possession of the carrier, demanded them of him, upon which the carrier refused to deliver them without being paid for the carriage. The owner brought trover; and it was held that he (the carrier) might justify detaining them against the right owner for the carriage; for when A brought them he was obliged to receive and carry them; and therefore, since the law compelled him to carry them, it will give him remedy for the premium due for the carriage." In the principal case of *York v. Greenaugh*, though the Judges differed upon a point that arose on the pleadings, they appear to have been all of opinion that, if a stranger brings, *as a guest*, a horse to an inn, the innkeeper is entitled to detain the horse for "his keep," until paid for it, against the demand of the owner of the horse, and although the horse was tortiously obtained by the guest in whose apparent possession the animal was when brought to the inn. And Lord Tenterden recognised that proposition as law in *Johnson v. Hill (b)*, with this qualification, however, that, if the innkeeper knew that the guest, when he brought the horse, was not the owner of the horse, but a wrong-doer, he could not insist on any recompense for keeping the animal. The case of *The Exeter Carrier* has never been overruled in this country. It has been, in one instance, contradicted by actual decision, though, in another instance, apparently recognised in America.—[See *Angel on Carriers*, sections 363 to 367.]—I refer to it now because it has been the subject of a good deal of discussion at the Bar, and because I wish not to be understood as questioning its authority. It is certainly a *Nisi Prius* decision; but it is a decision cited and adopted by Lord Holt in dealing, *in banco*, with a subject directly connected with it in principle. And it must be remembered that it was so dealt with by the same great Judge, whose judgment in the case

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T. 1865. of *Coggs v. Bernard* (a) has been always, since that case was decided, regarded as the leading authority upon the law of bailments. I may add that it so happened that the judgment in *York v. Greenough* was delivered in Easter Term, 2 Anne, A.D. 1703, and that of *Coggs v. Bernard* almost immediately after, in the next succeeding Trinity Term.

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The present case must be governed by considerations wholly distinct from those which influenced the decision in the case of the *Exeter carrier*, or in the case of *York v. Greenough*. When an innkeeper receives a guest, with the horse on which he travels, or when, in the ordinary course of business, a carrier receives goods from the possession of the sender, he deals with a person having all the *indicia* of property. Possession is, in itself, *prima facie* evidence of ownership. To encumber an innkeeper, or a carrier, with the obligation of inquiring and determining the relation in which the guest, or the sender of the goods, stands in reference to his possession of what he brings, would be totally inconsistent with the relation in which both the innkeeper and the carrier stand towards the public, for whose benefit they profess to act, and do act, in their respective callings. The business of either could not be carried on if, in the one case, the doors of the inn were closed against a traveller, or in the other, the carrier's conveyance were delayed at each stopping-place on his journey, until such inquiry should be made. But no such mischief can result from the qualification which Lord Tenterden applied to the rights and obligations of an innkeeper. There can, I apprehend, be no room for doubt, that a similar qualification applies to the rights and liabilities of a carrier: and that if a carrier knows (for example) that a thief gives him the goods of the true owner to carry, he cannot charge the owner for the service which he has knowingly rendered to the thief in the carrying of the goods. Though no such misconduct, or anything approaching to it, occurred in the case now before us, the circumstances under which the defendant received, and carried, the parcel in question, in my opinion, preclude him from any right, against the plaintiff, to charge for its carriage. The parcel was, by

(a) 2 Lord Ray. 909.

the plaintiff, the owner, delivered to the Belfast Junction Railway Company, at Belfast. The parcel was there booked, and the fare of it, from Belfast to Drogheda, was paid to that Company on its delivery to them, for carriage. That Company's line terminated at Drogheda; and the course of dealing between the plaintiff and them was, that they took his parcels, and carried them to Drogheda, but carried them no farther. The parcel in question bore this direction: "Mr. Patrick M'Bride, per rail to Drogheda, thence per mail car to Virginia." Up to the end of 1861, the plaintiff's parcels had been sent forward from Drogheda to Kells by the railway of another Company (the Dublin and Kells Railway Company); and from Kells to Virginia by a *post* car: sometimes by a post car of the defendant's, sometimes by a post car of a person named Smith; whose car the defendant afterwards purchased, and to whose business as a carrier he succeeded. Neither of these was a *mail* car. That car plied from Drogheda, direct, to Virginia. It was proved, without controversy, that about the end of 1861, the plaintiff, whether at the suggestion of M'Bride (his agent for the embroidering of muslin in Virginia) or not is immaterial, caused a notice or direction to be given to the managers at Drogheda, of the Dublin and Drogheda Railway Company (to whom the railway from Drogheda to Kells belongs); also to the manager of the Drogheda and Kells line of Railway at Kells; and also to the defendant Denham, to the effect, that his (the plaintiff's) parcels should no longer be transmitted by the Drogheda and Kells Railway, or by the defendant's car, but should be forwarded by the mail car, which plied between Drogheda and Virginia, and which belonged to a person named Flanagan. With Flanagan, through M'Bride, an arrangement was made by the plaintiff, that *all* his parcels should be so taken by Flanagan, at a charge less than the aggregate amount of the united charges made by the Drogheda and Kells Railway Company and the defendant. Upon the facts proved, it is perfectly clear that there was no contract on the part of the Dublin and Belfast Junction Company to carry the parcel in question farther than Drogheda; and that by the course of dealing between them and the plaintiff, and by their accepting the parcel

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with the direction which it bore, they became the plaintiff's agents for a limited and specified purpose—namely, for the purpose of forwarding the parcel from Drogheda (the end of *their* line) to Virginia, "*per mail car*;" but with no authority to forward it by any other route or mode of conveyance.* It is therefore plain, that neither directly, nor through any agent, did the plaintiff agree with, or employ, the defendant to carry the parcel in question. It is equally plain, not only that the defendant had express notice that the plaintiff desired that his parcels should not be taken by the defendant, but that he was expressly forbidden by M'Bride, on behalf of the plaintiff, to bring any of his parcels to Virginia. The parcel in question, by the express terms which it bore, conveyed, to the defendant, on the face of it, distinct information that it was the owner's positive direction that it should be carried by another route. And the defendant admitted, in his evidence on the trial, that he knew that M'Bride was getting parcels (which the defendant did not bring); that he was told by Flanagan's driver that M'Bride had employed Flanagan's car to carry the goods; and that he (the defendant) knew that the parcel in question "came wrong." He stated, however, that he did not know that it came by mistake: a statement the meaning of which it is not easy to understand. Under these circumstances, the defendant's Counsel contended, that when the agent of the Drogheda and Kells Company gave the defendant the parcel to carry, he was bound to receive and to carry it; and that being so bound, he had a lien for the fare of it against the plaintiff, the owner. It is not material to consider whether the defendant was bound, as between him and the Drogheda and Kells Company, to carry the parcel to Virginia. Upon that it is unnecessary to pronounce an opinion in this case. I wish not to be understood as saying that such an obligation did not exist. But if he *was* so bound, and acted upon that obligation in receiving the parcel from them, and in carrying it to Virginia, he acted, not as the carrier of the plaintiff, but as the carrier of the Drogheda and Kells Railway Company; not at the risk or cost of the plaintiff, but

* See the judgment of Mr. Justice Crompton, in *The Directors of the Bristol and Exeter Railway v. Collins* (7 H. of L. Cas. 213).

at his own risk, or at the risk and cost of those who employed him. H. T. 1865.
It may have been a very proper thing for the Drogheda and Kells
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Company, since they committed the misprision (whether by neglect,
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by accident, or by mistake) of taking the parcel in violation of the
directions which they had received from the plaintiff (and which
the parcel itself intimated), to repair the error by forwarding the
parcel to its destination in the speediest way, and by sending it
through the hands of the defendant, instead of taking it back to
Drogheda, and losing one or two days in so forwarding it to
Virginia. But if they so acted, in opposition to the injunction of
M'Bride and to the directions on the parcel, it was their act, and
not the act of the plaintiff, or one for which he was responsible.
The defendant had, according to the law which clearly governs the
relations of a common carrier with his employers and the public, a
right to demand, and to receive, the fare of the parcel from the
Drogheda and Kells Railway Company before he undertook the
carriage of it. If he had been paid by them, he would have had,
and would have needed, no lien for the cost of carriage. If he
chose to take the parcel without being paid for the fare of it, he
might have refused to deliver it up to the Drogheda and Dublin
Railway Company, if *they* had demanded it, at Virginia, without
being paid the fare by them. But he could not, by omitting to
require payment from them, as employers, cast the burden, which
he might have obliged them to bear as the condition of his taking
the parcel, upon the plaintiff, who did not employ him, and thus
create, for himself, a right against the plaintiff, in case of those
who ought not to have had custody of the parcel at all, and by
whose act it came into the defendant's charge. Such a claim
appears to be as much opposed to justice and to reason as I think
it is to law. No authority, either in decision, or even in the *dictum*
of any Judge or jurist, has been cited in support of it. And I can
find nothing to warrant it in the known principles which govern the
relation of carrier and employee, or in the nature of the business or
employment of a common carrier.

The case before us is presented with some circumstances which
show to what a preposterous length such a claim might be pushed.

H. T. 1865. Not only did the defendant not seek payment from the Drogheda and Kells Company, who committed the parcel to his custody, but he actually paid, to that Company, the fare of the parcel from Drogheda to Kells; and that fare formed one-half of the sum which he demanded from the plaintiff's agent M'Bride, and without the payment of which he refused to give up the parcel. Again, when he was desired by M'Bride, after the first parcel, similarly addressed, was brought by the defendant to Virginia, not to bring any more parcels, the defendant's reply (according to the statement of M'Bride) was, "that his car was for that purpose, and that he would bring all the parcels he could get." M'Bride then told him, that if he persevered, he would try what the law of the land would say to him for persevering in interfering with their goods. M'Bride stated this in his evidence, and the defendant did not deny it. In effect, he testified a determination to bring the parcels, and to charge for them, against the positive desire of the plaintiff, conveyed through his authorised agent, to the defendant. I am aware of no principle of law which can warrant a carrier in thus forcing upon the owner of goods a service which the owner repudiates, and in then claiming to keep the goods until he shall have been paid for the repudiated service.

The LORD CHIEF BARON then proceeded to observe, in detail, upon the evidence as to the second ground of objection, and stated, that the Court were of opinion that there was not any evidence to sustain the allegation that the direction given to the defendant not to bring the plaintiff's parcels had been withdrawn; and that, notwithstanding the finding of the jury upon the question submitted to them as to that matter, at the desire of the defendant's Counsel, the direction to the jury, upon their answers to the other questions, to find a verdict for the plaintiff was right. The judgment of the Court, therefore, being, that the defendant had failed on both the points which had been argued, the Court allowed the cause shown, against the conditional order to enter a verdict for the defendant.

FITZGERALD, B.

I am of opinion that there was no evidence in the case which

warranted the leaving to the jury the question, whether the plaintiff had withdrawn the direction given to the defendant? There was evidence of the fact of parcels having been paid for subsequent to the direction, but no evidence of what passed at the time such payments were made, except that of the plaintiff himself, which was, if believed, inconsistent with a withdrawal.

There being on the parcel carried by the defendant, which was the subject of the action, an express direction that it should be carried by another conveyance than his, I do not think it was any part of his duty as a common carrier to convey it so as to give him a lien on the parcel for his fare as against the plaintiff.

HUGHES and DEASY, BB., concurred.

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CONDON v. THE GREAT SOUTHERN AND WESTERN
RAILWAY COMPANY.

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May 29, 30.

THIS was an action, under Lord Campbell's Act (9 & 10 Vic., c. 93), by a mother, to recover damages for the loss incurred by the death of her son, a boy fourteen years of age. Plaintiff's husband had been killed by a locomotive engine of the defendants at the same time as her son; and she had recovered £400 damages for the loss of her husband. The action was tried before Mr. Sergeant *Armstrong*, acting as Judge of Assize at the Spring Assizes for the county of Limerick 1865. The case turned upon the seventh issue, "Whether the plaintiff, or any or either of the persons for whom or on whose behalf she had brought the action, did sustain any pecuniary loss whatsoever by reason of the matter in the said

In an action, under Lord Campbell's Act (9 & 10 Vic., c. 93), by a widow, for damages upon the death of her son, aged fourteen, who had never earned any wages, but whose capabilities were valued at sixpence per day, the probability that he would have enabled his mother to earn more, or would have devoted part of his earnings to her support, is evidence to go to the jury upon the question of damages. The probability is increased by the past filial conduct of the deceased.

There is no analogy between the nature and amount of the services whose loss will sustain an action for seduction and one under Lord Campbell's Act.

T. T. 1865. *Exchequer.* "writ complained of." Ellen Condon, the plaintiff, stated "That
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 G. S. AND W. "are living. Witness was milkwoman to Mr. Hewson. Her
 RAILWAY. "deceased husband was herd to Mr. Hewson. Her son was
 "fourteen years of age. He was able to do the business in his
 "father's absence; to go four miles to bring a load of hay, and
 "fodder the cows; to take the calves to the butcher's; and bring
 "the cows back and forward, and count them, and look after them
 "all whenever his father was away. He would go with the donkey-
 "cart for coals. We had £12 pounds a-year wages, a house,
 "firing and candles, and support—*i. e.*, finding for selves' family.
 "I finished the year, and settled the amount at end of the year.
 "Michael would be of use to me to assist me to carry on any
 "business. He would be now nearly as useful as his father. One
 "of the children is going on eleven and the other nine. I have a
 "house taken. I am selling a little bread." On cross-examination
 Mrs. Condon stated that her deceased son got no wages from Mr.
 Hewson. "He used to help his father, and I was sending him to
 school. I never sent Michael to earn anything." Mr. Hewson
 stated that he knew the deceased but slightly. He was away for a
 long time; he had been only a short time on the farm when he
 was killed; he was a very small boy; he might drive a donkey
 or pick stones off a field; he might be worth sixpence a day.
 He never earned anything from me.

At the close of the plaintiff's case, his Lordship refused to direct
 a verdict for the defendants, at the request of defendants' Counsel.

His Lordship told the jury that he did not consider it necessary,
 in order to maintain the action, that the deceased should have been
 in the receipt of wages which he handed over to his father or
 mother, and which went into a common fund, or was applied to the
 general purposes of the family. The jury were at liberty to
 consider whether in the changed condition of the mother (occa-
 sioned by the father's death), it was reasonably to be expected that
 if the boy had lived he would have been of some appreciable and
 substantial benefit to his mother, by sharing his labour, and thereby

enabling her to earn the more for herself and her other children (as to which the jury ought to consider his past conduct and the services he had rendered), or by actually earning something which he would have allowed her to have the benefit of. There was no evidence that he was undutiful or undocile, but rather the contrary; and they might consider whether if he were able to earn, he would have helped his mother by those earnings. But, in this view, if they chose to adopt it, they should allow and deduct for his reasonable support and maintenance, and consider only the surplus profit, if any, possibly derivable from his earnings.

His Lordship told the jury not to consider with a view to damages the mother's feelings in the loss of comfort, but solely her loss in moneys numbered actually sustained by his death.

His Lordship also directed the jury to bear in mind the age of the deceased; the chance of his life dropping; probability that if he had lived he would ere long have been doing for himself, and not for his mother or the other children; and further, that the deceased would not have been under any legal obligation to contribute to their support, even though able to do so.

The jury found for the plaintiff, with £10 damages.

No objection was made to the charge.

Leave was reserved to the defendants to move to enter the verdict for defendants, upon the ground that there was no evidence to go to the jury of any damage having been sustained by the plaintiff. A conditional order to that effect having been obtained—

Exham (with whom was *Cleary*) now showed cause.

The probability of the future value of the services of the deceased is the true test of action under Lord Campbell's Act: *Duckworth v. Johnson* (a); *Franklin v. The South Eastern Railway Co.* (b); *Pyne v. The Great Northern Railway Co.* (c).

J. Coffey (with whom were *Jellett* and *Neligan*), contra.

There is no case in the books in which damages have been given

(a) 4 Hurl. & N. 653.

(b) 3 Hurl. & N. 211.

(c) 4 Best & Sm. 396.

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under Lord Campbell's Act, where the deceased was not in receipt of money or wages at the time of his death: *Duckworth v. Johnson*—*per* Watson, B. The evidence of Mrs. Condon and of Mr. Hewson do not supply any basis upon which a jury could calculate the value of the services of the deceased, and the loss incurred by his mother. Their evidence comes simply to this, "that he might drive "a donkey-cart—he might be able to earn sixpence a-day; but he "never had received any money wages."

There must be some scintilla of evidence to go to the jury: *Avery v. Bowden* (a); *M'Mahon v. Leonard* (b). It lay upon the plaintiff to prove the affirmative; but the evidence is consistent with the deceased aiding or refusing to aid his mother, when he came into the receipt of wages. Some actual benefit from the deceased to the plaintiff must be proved. Annual presents of tea and sugar were held sufficient in *Dalton v. The South Eastern Railway Co.* (c). The deceased was not bound to support his mother.

PIGOT, C. B.

May 30.

The rule of law to be applied in this case is clear. The only question is as to the application of it. It is now established by a series of decisions, first, that, in such an action as the present, the damages must be estimated with reference to pecuniary loss alone; and, secondly, that, in estimating such pecuniary loss, the jury are to consider, when the evidence warrants their so doing, the reasonable probability of pecuniary benefit accruing to the party claiming the damages, if the death of the deceased had not occurred. Such is the rule adopted from former decisions, and laid down in the last of the cases decided on this subject—*Pyne v. The Great Northern Railway Co.* (d).

In substance the law in the abstract was stated by the learned Judge (Sergeant *Armstrong*, acting as Judge of Assize) in his charge to the jury, at the trial of this action, in entire conformity

(a) 6 ELL. & BL. 973.

(b) 6 H. of L. Cas. 993.

(c) 4 Com. B., N. S. 296.

(d) 2 B. & S. 759; S. C., 4 B. & S. 396.

with those authorities. And what we have to determine is, whether there was any evidence of damages sustained by the plaintiff within that rule of law by which an exposition has been so given to Lord Campbell's Act (9 & 10 *Vic.*, c. 93).

There was clear evidence of the capability of the deceased to render service to the plaintiff, his surviving parent, or to earn wages, which might have been applied to the benefit of her and the other members of the family. There was evidence which the learned Judge interpreted, and which the jury were entitled similarly to interpret, as establishing that the deceased had been in the habit of rendering services in aid of his parents, and from which they would have been warranted in inferring that the deceased was so disposed towards his mother and family that he would in all reasonable probability render services for their benefit in future. There was evidence of the pecuniary value of the services which he was capable of performing, and the wages which he was competent to earn. The plaintiff's employer, who was plainly not disposed to exaggerate the capabilities of the deceased, estimated those services as of the value of a sum, small indeed in daily hire, but still amounting to what, as a pecuniary estimate of value (sixpence a-day or three shillings a-week), could not have been withdrawn from the jury. The jury had then to consider, according to their view of the motives that actuate the members of a family in humble life, and according to their view of the proof given at the trial, of the previous conduct of the deceased towards his parents, whether there was or was not a fair and reasonable probability that the deceased would have continued to reside in the maternal domicile, and have continued to fulfil towards his mother the ordinary duties of a son; which, though duties of imperfect obligation, are duties still. And as to the probable performance of those duties, the jury were entitled to apply their own experience and knowledge of life, and to consider the habits of the peasantry in this country, and the probable amount of assistance and support which a widow might fairly and reasonably expect from a son. It would be to shut our eyes to what is daily passing around us among the population of this country, to ignore the fidelity with which those duties of imperfect

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T. T. 1865. obligation are often discharged by children towards their parents,
Eschequer. even where a long lapse of time has intervened since they parted,
CONDON and although during the interval they have been separated by vast
v. distances from each other—living in fact, in many instances, in dif-
GT.S. AND W. ferent quarters of the globe.
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It was suggested, in the course of the argument, that the jury may have been induced to give damages on account of benefit derived from the son, in substitution of benefit derived from the father, the loss of which latter benefit had been the subject of ample compensation given to the plaintiff in another action against the defendants. And, if the jury had been directed to give damages on that ground, and such direction had been made the subject of objection to the charge of the learned Judge, there would have been much reason for urging that such a direction could not be sustained, as it would have led in effect to double compensation for the same loss under the Act of Parliament. But the learned Judge, as I read his charge, gave no such direction. He merely told the jury that he thought they were at liberty to consider whether, in the changed condition of the family occasioned by the father's death, *it was reasonably to be expected* that if the boy had lived he would have been of some appreciable and substantial benefit to his mother, by enabling her to earn more, or by helping his mother by his own earnings; as to which they might consider his past conduct, and the services he had rendered. The effect of those observations of the learned Judge was nothing more than conveying to the jury that, from the past conduct of the deceased, they might infer what his future conduct would be;—which was precisely what was done in *Dalton v. The South Eastern Railway Co. (a)*;—and that the probability of such future conduct in the son was enhanced; and the ground of reasonable expectation that he would discharge the ordinary filial duties was enlarged, by the calamity which deprived his mother of a husband, and the infant children, as well as himself, of a father, and by the probable sense which he would entertain of that calamity. But the learned Judge at the same time told the jury that they were to weigh,

(a) 4 Com. B., N. S. 296.

against all those considerations, the contingency that the deceased might, notwithstanding them, leave the family, and would, if he had lived, "ere long have been doing for himself, and not for her" (his mother), "or her children." The learned Judge, in this part of his summing up, appears to have presented fairly and succinctly matters proper for the consideration of the jury at both sides. Even if his instructions in this respect were open to objection, we could not now entertain an objection which was not made at the trial. If there was anything objectionable in the manner in which these topics were left to the consideration of the jury, the attention of the learned Judge ought to have been called to it at the time; and the omission to give to him, by so doing, an opportunity of altering or explaining his instructions to the jury, must, according to settled authority, preclude the defendants from now disturbing the verdict on that ground. If we thought the jury had been misled in a matter which may have unduly affected their estimate of the damages, and the damages were large enough to warrant it, we might, in the exercise of the ordinary discretion of a Court of Law, in such circumstances, send the case to another jury. But there was nothing in the charge of the learned Judge which would warrant our interfering in that way, even if the damages had been larger than the small amount of this verdict.

It was suggested, during the argument, that any service, however small, of the deceased, which had been withdrawn from his mother by his death, such as might, if rendered by a daughter to a parent, enable the parent to sustain an action for her seduction, would constitute a sufficient ground to entitle the plaintiff to damages in such a case as the present. We desire not to be understood as giving any sanction to that argument. Between the small amount of service which may be sufficient in many cases to save the plaintiff from a nonsuit, on the technical ground on which an action for seduction is still held unsustainable, without *some* proof of services showing that the female who has been seduced was, at the time of the seduction, the plaintiff's servant, and the pecuniary loss, which

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T. T. 1865. must be proved in an action under Lord Campbell's Act, there
Exchequer. is no sort of analogy.

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 GT.S. AND W. BAILWAY. The only question on which, in result, we have to decide is,
 whether there was evidence to be submitted to the jury on the
 subject of damages; we cannot hold there was not.

Upon the learned Judge's report it appears that there was no point saved; that the only objection to his charge was, that he left the question of damages to the jury; and that the only direction which he was called upon to give to the jury was, a direction to find a verdict for the defendants. We cannot enter into a consideration of the amount of the damages, or the weight of the evidence. We cannot hold that the learned Judge ought to have directed a verdict for the defendants. And the result is, that the cause shown against the conditional order must be allowed.

FITZGERALD, B.

I wish to be understood as merely deciding that there was evidence to go to the jury in this case.

HUGHES, B.

I do not think that this case should be a precedent. The learned Sergeant evidently thought that the life of the deceased boy could be valued in two points of view—either that he could help his mother, a widow, to earn more, or that he could earn money for himself, and hand it all, or part of it, to his mother.

DEASY, B., concurred.

Liberty to appeal refused.

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Queen's Bench

THE QUEEN, at the prosecution of JOHN M'CARTHY,
 v.
 THE JUSTICES OF THE PEACE IN AND FOR THE
 COUNTY OF CORK.*

(*Queen's Bench.*)

May 27.

ON the 22nd of December 1865, on application to Mr. Justice O'BRIEN, a conditional order had been obtained for a writ of *certiorari* directed to the defendants to remove into this Court, &c., all and singular records of conviction of whatsoever trespasses and contempts whereof John M'Carthy was, at the Petty Sessions held for the Mallow Petty Sessions district of said county, on the 28th of November and 12th of December 1865, convicted, on the complaint of one James Hartnett, for having and keeping a certain dog. The grounds of removal stated in the conditional order were, that the said conviction was made without and in excess of jurisdiction, and that the said conviction was insufficient, and disclosed no offence the subject of the summary jurisdiction, or for which Justices in Petty Sessions had jurisdiction to impose a pecuniary penalty, or the penalty mentioned in the said conviction, and that there was no evidence to warrant the said conviction.

Conviction at Petty Sessions for keeping a setting dog—*Held*, bad, the Act prohibiting the keeping of setting dogs conferring no summary jurisdiction.

It appeared from the affidavit of the prosecutor, on which the conditional order had been obtained, that he was summoned, on the complaint of James Hartnett, "for having and keeping on "a certain day, *on the lands of Rahan*, a certain dog, called and "being a setting dog, the same not being a whelp under the age "of twelve months, kept at nurse for persons qualified within the "statute in such case made for the having the same; he not then "having an estate of freehold, in his own or his wife's right, of "the yearly value of £100 of the former currency of Ireland,

* *Coram* LEFROY, C. J., O'BRIEN and FITZGERALD, JJ.

T. T. 1866. "equal to £92. 6s. 1½d. sterling, present currency, or a personal
Queen's Bench "estate of the value of £1000 of said former currency, equal to
 THE QUEEN "£923. 1s. 6½d. sterling present currency, nor being a person
 v. "allowed or licensed thereunto, &c., nor otherwise qualified." That
 JUSTICES OF "on the case coming on for hearing, Hartnett swore that he saw
 CO. CORK. prosecutor with a dog and gun *on the lands of Fiddane*, and
 that he had seen the said dog set; that he was thirty years of
 age, and never had a pointer, hound, beagle, or greyhound, land
 spaniel, or setting dog, and could not tell the difference between
 any or either of them. That one Harris also swore that he had
 on one occasion "shot over" the dog in question, and that he
 saw said dog set partridge. Harris could not swear what breed
 the dog was. That the dog in question was not a pointer, hound,
 beagle, greyhound, or land spaniel, but was a dog which set game,
 and was of a species and breed totally different from either a pointer,
 hound, beagle, greyhound, or land spaniel. That evidence was
 offered that the prosecutor was not properly qualified within the
 Acts. That the Justices were urged to submit the case to the
 Law Adviser; but they only submitted the point as to the variance
 of the place; and, the case having been allowed to stand over
 to the 12th of December, they on that day made an order fining the
 prosecutor £4. 12s. 3½d.—ten shillings to the informer, the rest to
 the Crown, and to be levied by distress in default of payment
 within one month.

From the affidavits filed as cause, it appeared that Fiddane
 was in the parish of Rahan, and that Hartnett was acting as
 gamekeeper, and deposed to knowing the dog in question to be
 a setting dog, and to have been used as such previous to the
 day of the alleged defence.

The following are the statutes on which the Justices acted:—The
 10 W. 3, c. 8 (*Ir.*), s. 2—"And be it further enacted by the authority
 "aforesaid, that, from and after the 20th day of October 1698, no
 "person or persons whatsoever not having an estate of freehold in
 "his own or his wife's right, of the yearly value of £40 at the least,
 "or a personal estate of the value of £1000 at least, over and above
 "all debts by him owing, either for himself or as a servant to any

"other, unless he be such servant as hath no other way of live-
 "libood, for his wages from such person, have or keep any hound,
 "beagle, greyhound, or land spaniel, within this kingdom, other
 "than and except whelps under the age of twelve months, which
 "shall be kept at nurse for persons qualified within this Act
 "for the having the same, on pain that such hound, beagle,
 "greyhound, or spaniel, so kept contrary hereunto, shall or may
 "be seized and taken away by any Justice of the Peace of the
 "respective counties where the same shall be so kept, or by
 "any person or persons authorised thereunto by warrant under
 "the hand and seal of such Justice of the Peace, or by any
 "person having a freehold of the yearly value of £40 or up-
 "wards, within such county; which Justice of the Peace and
 "freeholder respectively seizing such hound, beagle, greyhound,
 "or spaniel, may detain, to his and their own use, or otherwise
 "dispose of the same as they shall think fit; and all and every
 "person or persons so keeping such hound, beagle, greyhound,
 "or spaniel, contrary hereunto, and being thereof convict before
 "some Justice of the Peace of the county where the offence
 "shall be committed, on the oath of one or more credible witness
 "or witnesses, which oath such Justice of the Peace is hereby
 "authorised to administer, shall, for every such offence, forfeit
 "and lose the sum of £5, to be levied by warrant of such
 "Justice of the Peace before whom such offender shall be con-
 "vict, by distress and sale of the goods of such offender, returning
 "the overplus (if any be) to the party distrained on; the one
 "moiety thereof to the informer, who shall prosecute for the same;
 "the other moiety to be issued for the use of the poor of the
 "parish where such offence shall be committed."

Sec. 10 :—"And it is further enacted by the authority aforesaid,
 "that no person or persons, after the 20th of October 1698, not hav-
 "ing an estate of freehold of the yearly value of £100, or upwards,
 "or a personal estate of the value of £1000, shall have or keep any
 "setting dog or bitch, other than such person or persons as shall be
 "allowed or be caused thereunto by the Justices of the Peace of the
 "county where he shall live, at the general Quarter Sessions of the

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"Peace, to be held for such county next after Christmas in every
 "year, in order to the making and training up setting dogs or
 "bitches; and that under such regulations only, and no otherwise,
 "as shall be allowed and specified in such license; and such person
 "or persons so to be licensed shall also, and are hereby required,
 "every two years during the continuance of such this license, to
 "train up, teach and make some one or more hound or hounds to
 "hunt on dry foot, and in default thereof that such license so
 "obtained shall be and become of no force and effect, and shall be
 "reputed and deemed so to have been from the granting the same;
 "and the person or persons to whom the same was granted shall be
 "liable to the same penalties as if he or they had acted without,
 "such license."

27 *G. 3, c. 35 (Ir.)*, s. 8:—"And whereas, by an Act" (reciting last-mentioned Act), "it is enacted, that no person or persons
 "shall have or keep any setting dog or bitch, except under
 "the qualifications and regulations therein particularly mentioned;
 "be it enacted by the authority aforesaid, that from and after the
 "said first day of June 1787, no person or persons shall have or
 "keep any pointer, hound, beagle, greyhound, or land spaniel, other
 "than and except such person or persons as by the said Act may
 "have or keep any setting dog or bitch, and under and subject to
 "the same qualifications, regulations, and penalties."

W. M. Johnston now applied to make absolute the conditional order. This conviction was for keeping a setting dog. Section 2 of 10 *W. 3, c. 8*, gives summary jurisdiction to Justices, but does not mention a setting dog. Section 10 forbids the keeping of setting dogs, but does not create any summary jurisdiction. Moreover, here the Justices have ordered a distress in default of payment, which is not authorised by the section as to setting dogs. A distress can only be given where the statute specially authorises it. Where no penalty is attached by the statute, the proper course would be then to proceed by indictment: 2 *Coke Inst.*, p. 163. The only other Act on the subject is the 27 *G. 3, c. 35, sec. 8*; but that does not impose any further penalty on keeping setting dogs;

it only confines the right to keep other dogs to those persons allowed to keep setting dogs by the earlier Act.

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Heron, instructed by the prosecutor below, in support of the conviction. JUSTICES OF
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A setting dog is not any particular breed of dog. Any dog that is used for the purposes of sporting may be a setting dog. It is true sec. 10 of 10 *W.* 3, does not impose any penalty; but sec. 8 of 27 *G.* 3 refers to penalties on keeping setting dogs; "under and subject to the same qualifications, regulations and penalties." In *Mr. Longfield's Game Laws of Ireland*, p. 31, he says, referring to the 10th sec. of 10 *W.* 3, c. 8:—"The only mode of punishing "a breach of these regulations might seem to be by indictment for a "misdemeanour, unless by a not unreasonable construction of the "8th section of 27 *G.* 3, c. 35, the penalties referred to were held "to be those imposed by the 2nd section of the 10 *W.* 3, c. 8."—[FITZGERALD, J. If "not unreasonable," very illegal.]—All the dogs mentioned in the 27 *G.* 3, pointers, hounds, &c., are put under the same qualifications, regulations and penalties as setting dogs. If these penalties do not apply to setting dogs, then they do not apply to the other dogs mentioned.—[O'BRIEN, J. The first Act established certain rules for one class of dogs, and certain other rules for a second class of dogs—i. e., setting dogs. It appointed penalties for keeping dogs of the first class, and none for keeping those of the second: then comes the Act of *G.* 3, which leaves the law as to setting dogs as before, but says that the qualifications for keeping dogs of the first class shall be the same as those appointed for keeping dogs of the second class under the first Act.]

Per Curiam.—Make absolute the conditional order.

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 At the prosecution of JOHN LITTLE, Mayor of Belfast,
 v.
 JOHN REA.

Jan. 14, 15,
 30.

A defendant in criminal information challenged the array of jurors, on the following grounds—First; that the jurors were summoned in virtue of a writ of *feri facias* and *distringas*, and not according to the statute. Secondly; without a precept of the Judge of Assize. Thirdly; without six days' previous summons. Eighthly, that the Sheriff did not make out the special jury list properly, and that various officers of the county had violated their duties with regard to the jurors' list. A demurrer taken *ore tenus* to the challenge was allowed.

CRIMINAL INFORMATION.—This was a criminal information, for obstructing the prosecutor, the Mayor of Belfast, in the execution of his duty as Mayor; and for words spoken with intent to provoke the prosecutor, while in the execution of his duty as Mayor, to commit a breach of the peace; and for a libel.

A trial was had before Hayes, J., at the Assizes for the county of Antrim, in July 1863, when the defendant challenged the array of the panel. The *postea* stated that:—"Afterwards, on the day "and at the place last within contained, before the Hon. Edmund "Hayes, one of the Justices," and soforth . . . "and the "jurors of the jury within mentioned, being called, come, and the "said John Rea thereupon, in his own proper person, hands in "a challenge to the array, in the words and figures following:— "' John Rea, at the suit of the Queen, and now at this day, to "' wit, on the 25th day of July, one thousand, eight hundred "' and sixty-three, come as well our said Lady the Queen, by "' her said coroner and attorney, as the said John Rea, in his "' own proper person, and the jurors of the jury also empaneled, "' also come; and hereupon the said John Rea challengeth the "' array of the said panel upon the following grounds, that is

Held—That the demurrer was rightly allowed.

Held also—That the 3 & 4 W. 4, c. 91, s. 18, is directory and not mandatory.

Semble (per HAYES, J.)—That, where the challenger relies upon specific facts, as the omission of particular names from the jury panel, his pleading ought to give the names.

Semble also (per HAYES, J.)—That the process of *venire* and *distringas* is not abolished by the Common Law Procedure Act, 1853, for criminal proceedings.

Fogarty v. The Queen reviewed.

“to say :—Because he saith that the said jurors so empaneled
 “as aforesaid were summoned to serve upon said jury for the
 “trial of the issues in this cause, by virtue and in pursuance
 “of a writ of *venire facias* and a writ of *distringas juratores*,
 “and not otherwise, or according to the form of the statutable
 “enactments in that case made and provided.’”

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“And because the said jury were not summoned under any
 “precept issued by the Judge of Assize to the Sheriff of the
 “said county, pursuant to the provisions in that behalf, of the
 “Common Law Procedure Amendment Act (Ireland), one thousand
 “eight hundred and fifty-three.’”

“And because the said jurors were not duly summoned, pur-
 “suant to the provisions of the statute in that behalf made and
 “provided, six days before the commencement of the present As-
 “sises for the said county of Antrim.’”

“And because the said jurors, *or any of them*, were not duly
 “summoned, pursuant to the provisions of the statute in that
 “behalf made and provided, six days before the commencement
 “of the present pending Assizes for the said county.’”

“And because the Sheriff of the said county did not, within
 “the time and in the manner prescribed by the statute passed
 “in the session of Parliament held in the third and fourth years
 “of the reign of his late Majesty King William the Fourth,
 “and intituled ‘An Act for Consolidating and Amending the
 “‘Laws relating to Jurors and Juries in Ireland,’ make out the
 “‘special jurors’ list for said county; and of which list, *so ille-*
 “‘gally formed, the jurors, so empaneled as aforesaid, were
 “‘selected.’”

“And because the jurors, so empaneled as aforesaid, were
 “not taken or selected from a special jurors’ list, made pursuant
 “to the statute in that case made and provided.’”

“And because there is not, nor has there been, during the
 “present year, any special jurors’ list made or in existence, for
 “said county, pursuant to, or according to, the provisions of the
 “statute in that case made and provided.’”

“And because there have been omitted from the special jurors’
 “list of the said county, for the present current year, the names

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"of divers, to wit, two hundred persons, qualified and liable
 "to serve on special juries for said county, and named as jurors
 "in the jurors' book for the current year of said county."

"And because the juror's book for the current year of said
 "county has not been made pursuant to and in the manner
 "prescribed by the last-mentioned statute."

"And because no general list was made out by the Justices
 "at Special Sessions for said county of Antrim, or any of them,
 "containing the name or names of any person or persons qua-
 "lified to serve as jurors for said county for the present year."

"And because there was no general list whatever made out,
 "containing the names of the persons, or of any person or per-
 "sons, qualified to serve as jurors for the present current year,
 "for said county, by the Justices of said county, or any of
 "them."

"And because issue is not yet joined in this cause."

"And because the said jurors, so empaneled, were struck
 "before issue was joined in this cause."

"And because issue was not joined in this cause previous
 "to the twenty-fourth day of July instant, and the said jury
 "were struck and summoned previous to said day."

"And this the said John Rea is ready to verify.—Wherefore
 "he prayeth judgment, and that the said panel may be quashed."

To this challenge the prosecutor demurred. The demurrer was
 allowed; and the challenge to the array was overruled and dis-
 allowed.

In Michaelmas Term 1863 the Court granted to the defendant
 a conditional order to set aside the verdict, and that a *venire
 de novo* be awarded, upon the ground that the demurrer to the
 challenge taken by the defendant to the array ought to have
 been overruled, and that the challenge ought to have been allowed,
 on the several grounds stated in the challenge.

Against that conditional order cause was (this Term) shown by—

Brewster, H. H. Joy, Harrison, and Bruce.

As to the last three causes of challenge, they are unintelligible.

It is only necessary to state that, issue having been joined upon the record, and the case actually called on for trial, on the 25th of July 1863, the defendant *then* tendered a demurrer to the replications upon which issue had been joined: but the learned Judge refused to receive the demurrer, as the record had already been made up, and the case was at issue.

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The challenge contains an averment that the jury so empaneled were struck and summoned previous to the 24th of July. It is therefore averred that there was *a* jury summoned and empaneled, and that the jury, so summoned and empaneled, came. The substantial meaning of the challenge is, that the jury, so summoned, empaneled, and struck, were brought in under the Jury Acts, and not under the Common Law Procedure Act (Ireland) 1853—[FITZGERALD, J. Are the first two grounds more than introductory to the third, with a view to show the foundation on which the third rests?—Each is taken as a distinct ground of challenge: the word “because” precedes each clause. It is a mistake to suppose that any proceeding to summon and empanel the jury under the Common Law Procedure Act (Ireland) 1853, would have been right. That statute does not apply to criminal proceedings at all (section 3). Section 109 does not apply to such a case as this; and at all events is not compulsory, except in the first clause, “that no jury process shall be necessary or used *in any action*.” But the present case is not “an action.” There is not in the challenge any allegation that the Judges did not issue a precept; and, if they did issue one, it must have been to summon *all* civil and criminal jurors, which would have been sufficient.—[FITZGERALD, J. But on the record there is the old form of *venire* and *distringas*, which is quite inconsistent with the notion of a precept.]—But there is no averment that a precept *was* issued: the Court cannot hold that the Judge issued *no* precept. If he did issue a precept under section 109, it must have been a precept for the trial of all civil and criminal cases. Assume that, and that there was also a *venire* directed to the Sheriff, that would not in the least vitiate the summoning of the jurors under the Judge's precept, if there *was* one; and, if they were summoned at all, and there were two authorities

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for summoning them, the law would refer the matter to the right authority, whichever it was; so that the challenge on that ground is insufficient under section 112. Special jurors may either be summoned for *all* cases, or a particular special jury may be struck for a particular case. Whichever way the jury was summoned is immaterial; for the Court cannot assume that the Judge did not issue a precept; and, if it was issued, the Sheriff was bound to summon every juror. In *O'Neill* (in error) v. *The Queen* (a) it was held that the Common Law Procedure Act (Ireland), 1853, did not affect the Judge's authority to order a Sheriff to return a jury in a criminal case, though the civil panel be not exhausted. Therefore, in the first place, the Common Law Procedure Act (Ireland), 1853, does not apply to this case; and, secondly, the *venire* is not taken away in *all* cases, which it must be in order to support this challenge. At all events the first ground of challenge, however it may be error on the record, is not the subject of a challenge to the array. A challenge to the array lies only for some act improperly done, or omitted to be done, by the Sheriff. In *O'Connell* v. *The Queen* (b) Tindal, C. J., said:—"The only ground upon which the challenge to the array is allowed by the English law is, the unindifferency or default of the Sheriff." But the present challenge to the array rests on the ground that the jury was summoned under the *distringas*, instead of for something improperly done by the Sheriff antecedently to the time when he was put in motion by the writ of the Court, which he was bound to obey.—[FITZGERALD, J. But the judgment of the House of Lords did not touch that point?]
 —Yes; Lord Denman was the only lord who dissented from that judgment of Tindal, C. J.—[FITZGERALD, J. Then the House of Lords reversed the judgment of the Court below on that point?]
 —It was reversed on another point; and Lord Denman's judgment was based on the averments of fraud.—[O'BRIEN, J. But those averments were of matters anterior to the time when the writ was given to the Sheriff.]
 —But Lord Denman went on the principle that fraud vitiates everything.

(a) 4 Ir. Com. Law Rep. 221.

(b) 11 Cl. & Fin. 232, 247.

The third and fourth grounds of challenge are, in substance, that the 3 & 4 *W.* 4, c. 91, s. 18, is mandatory. Similar provisions as to summoning jurors have existed in the law from its foundation. By the 42 *Edw.* 3, c. 11, s. 3, the Sheriffs were to "array the panel" in Assizes *four days at the least* before the Sessions of the Justices, upon pain of £20; so that the parties may have the view of "the panels, if they the same demand." Then it came to be considered whether, if the Sheriff failed to comply with the statute, the plaintiff was therefore turned round in his action? But it was held that, the statute being in the affirmative, it sufficed if the panels were arrayed *two days* before the Sessions: *Brooke's Abr.*, tit. *Parl. and Stat.*, pl. 70. So the law stood in England for a long time, until the 7 & 8 *W.* 3, c. 32, s. 5, directed the Sheriff to summon the jurors *six days* before at the least. There followed the 29 *G.* 2 (*Ir.*), c. 6, s. 2 (which is in substance and form the same as the present Act), and the 6 *G.* 4, c. 50, s. 25. There is not in the English books a single case of a challenge to the array *because* a juror was not summoned in time. In *Edwards v. Harding* (a), Power, B., said "that it had been decided in *Lessee of Metge v. Costello*, in this Court, that the want of summons was no objection *"between the parties."* All the cases in Ireland have been decided at Nisi Prius. In *Gillespie v. Cumming* (b) the plaintiff, instead of demurring, took issue on the fact, which was found against him; and, though that case afterwards came before the Court of Exchequer, the point was not argued solemnly whether the statute was mandatory; but the question was as to the costs of the abortive trial: *Gillespie v. Cumming* (c). But, if the judgment of Pennefather, B., is right, the whole proceeding is bad if one juror be left unsummoned. *The Dundalk Western Railway Company v. Gray* (d) is no authority for anything, because it went upon the decision in *Gillespie v. Cumming*. No *distringas* having been allowed, there was no challenge to the array there. There are other decisions on the point: *Ronayne v. Elliott* (e); *Lessee Lord*

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(a) Vern. & Scriv. 100.

(b) 1 Cr. & Dix, Cir. Cas. 294.

(c) 2 Ir. Law Rep. 28.

(d) 1 Cr. & Dix, Cir. Cas. 332.

(e) Ir. Cir. Cas. 215.

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Kingston v. Dwyer (a); *Exors. Browne v. Fitzgerald* (b); *Nowlan v. The King* (c). The omission to summon a single juror cannot vitiate the whole trial: *The King v. Edmonds* (d). Words far stronger than the 18th section of the Jury Act contains have been held not to be mandatory: *Lessee of the Governors of St. Patrick's Hospital v. Dowling* (e); *Quin v. Aldwell* (f); *Gardiner v. Blasinton* (g); *Hayes v. The Queen* (h). Therefore, the words of the 3 & 4 W. 4, c. 91, s. 18, are directory; and the Common Law Procedure Act (Ireland), 1853, does not apply to criminal cases. There is nothing to warrant the fourth ground of challenge, because it is not alleged that the jury was a special jury; and at all events the statute, having nothing to do with the record, is on this point directory. The Court cannot presume—what is not averred—that there was either a special jurors' book, or a special jurors' list. Without either, a good panel might be made: 4 & 5 W. 4, c. 8, s. 2; *Ray v. Conrahy* (i); *O'Connell v. The Queen* (h). The argument as to the fourth ground of challenge is *a fortiori* applicable to the fifth. The sixth ground, if true, destroys the two preceding ones. The seventh ground is in direct opposition to the sixth. As to the eighth, no issue could have been taken on it. The ninth contains no allegation that there was not a good juror. The tenth is ruled by the words of the statute being only directory. The eleventh, twelfth, and thirteenth, contradict the record.

Sergeant *Armstrong*, and *Mac Mahon*, contra.

The defect in summoning the jurors is the subject of a challenge to the array, which is not confined to the case of unindifferency or improper conduct on the part of the Sheriff: *Rex v. Burridge* (l). That case shows that the challenge would be good, even though the

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| (a) Ir. Cir. Cas. 517. | (b) <i>Ibid</i> , 483. |
| (c) 1 H. & Br. 164. | (d) 4 B. & Ald. 471. |
| (e) Batty's Rep. 296. | (f) <i>Ibid</i> , 339. |
| (g) 1 Ir. Ck. Rep. 64; judgment reversed in <i>Gardiner v. Blasinton</i> , <i>ibid</i> , 79. | |
| (h) 10 Ir. Law Rep. 53. | (i) 1 Cr. & Dix, Cir. Cas. 56. |
| (k) 11 Cl. & Fin. 247, 248, 249, 354. (l) 1 Str. 593. | |

challenger had himself created the disqualification. Under the 3 & 4 *W.* 4, c. 91, the Sheriff has nothing to do with the formation of the jurors' book, yet its improper formation is the subject of a challenge to the array: *O'Connell v. The Queen* (a). The special jury should have been summoned under the precept of a Judge; for it was the Sheriff's duty to attend with the jurors' book before the officer of the Court, so that forty-eight names might be drawn under the old system. Then the officer should transmit to the Sheriff the names of the twenty-four jurors finally selected, instead of sending a *distringas*. By the 3 & 4 *W.* 4, c. 91, s. 25, the Sheriff is directed to take away with him the names of the forty-eight jurors, and preserve the list for future use. It has been argued that, *quâcunque viâ*, the jury was properly summoned, because the Court cannot *assume* that there was no precept; but it is averred that they were not summoned under *any* precept; and a precept there must be.—[FITZGERALD, J., referred to the case of *Aldborough v. Bland* (b).]—The 3 & 4 *W.* 4, c. 91, s. 18, is mandatory: *Gillespie v. Cumming* (c). Nor would there be any inconvenience in that course, or delay at the trial, in general; for such an objection could only be taken in the case of a jury struck under the old system; and, if the panel be quashed, the Judge may, under the 3 & 4 *W.* 4, c. 91, s. 15, direct a new panel to be summoned at once.—[HAYES, J. That 15th section does not apply to any but the Crown Court. A Judge in a Record Court could not do that.]—Suppose, however, that the 18th section was not mandatory, then all the twenty-four jurors may be absent on the day of trial; so that the plaintiff would be in a situation to choose a jury, by having his own friends in readiness. It would be much better that the plaintiff should for the time lose a trial, than that it should be had with unfair jurors.—[FITZGERALD, J. It would be very hard to say that section 18 is mandatory, when, under section 34, the Sheriff is to be punished *only* if he omits to summon the jurors *four* days before the commencement of the Assizes.]—*Walters v. Hughes* (d) is an express

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(a) 11 Cl. & Fin. (Lord Campbell's judgment) p. 407.

(b) 7 Ir. Com. Law Rep. 571.

(c) 1 Cr. & Dix, Cir. Cas. 294; S. C., 2 Ir. Law Rep. 28.

(d) 1 Cr. & Dix, Cir. Cas. 333, *note*.

H. T. 1864. authority that the 18th section is mandatory: *Dundalk Railway*
Queen's Bench Co. v. Gray (a). 'The jurors' list and book must be made out
 THE QUEEN correctly under the 3 & 4 W. 4, c. 91, which applies to this case:
 v. all the directions given in section 24 must be complied with.
 REA. The 4 & 5 W. 4, c. 8, s. 2, applied only to the year succeeding
 its enactment, but was not prospective. It is averred sufficiently
 that there was a jurors' book. Counsel also cited *Rogers v.*
Smith (b); *Staynor v. James* (c); *Beckenham v. Rye* (d); *Blod-*
well v. Edwards (e); *Young v. Watson* (f); *Farmer v. Mount-*
ford (g).

Joy, in reply.

In *Hartigan v. M'Carthy* (h), Pennefather, B., repudiated the
 notion that he or Richards, B., had expressed in *Gillespie v.*
Cumming any opinion whatever, as to the manner in which the
 objection should be raised, by challenge or otherwise. And Brady,
 C. B., said:—"A demurrer to that challenge admits only that one
 "of the jury might not have been served. *It is new law to me, if*
"that be held a valid ground of objection."—[HAYES, J., referred
 to *Moore v. O'Reilly* (i).]—That was only a Nisi Prius decision.
 Counsel also cited *Co. Lit.*, p. 156 a; 2 *Inst.*, p. 447, and *Rolle's*
Abr., tit. *Trial*, p. 642.

Cur. adv. vult.

LEFROY, C. J.

Jan. 30. This case came before the Court upon a motion for a *venire de*
novo, on the grounds that the learned Judge who tried the case
 had made an erroneous decision upon a demurrer, which he allowed,
 to a challenge to the array. We are of opinion that the learned
 Judge was right in allowing the demurrer, and overruling the
 challenge itself; and we are of that opinion, upon the grounds I am

(a) 1 Cr. & Dix., Cir. Cas. 332.

(b) 1 Ad. & El. 772.

(c) Cr. Eliz. 311.

(d) *Ibid*, 587.

(e) 3 Bulst. 220.

(f) Cited in *Rex v. Parry*, 5 T. R. 467.

(g) 8 Mee. & W. 266; 1 Ch. Arch. 350.

(h) Black. Dundas & Osb. Rep. 86.

(i) 6 Ir. Jur. 60.

about to state, at least, these are the reasons which have influenced my judgment in coming to that conclusion.

In point of principle, the first reason is that no challenge to the array can be taken but upon the ground of unindifferency in, or personal default of the Sheriff. That is a reason in point of principle. But if there needed an authority, there is the very highest authority for that rule, following up all the principles of law which were, I must say, so fully and accurately brought before the Court by Mr. *Joy*, in his reply, that I need not go into the detail of the authorities, especially because I have before me the authority of eleven of the Judges of England, given by Chief Justice Tindal to the House of Lords, upon the case which, strange to say, was cited as an authority for sustaining the eighteen objections which have been taken in this case to the array.

The case to which I allude is that of *O'Connell v. The Queen* (a); and it is curious to see how the objections now taken upon the record to the array are but a variation to a certain extent of the objections that were taken to the array in the case of *O'Connell v. The Queen*. Some small variations there are, but not any essential difference between the grounds of objection that were stated in that and in the present case; and as I have such an authority as that, I should consider it as a waste of time if I were to go further, which however I am prepared to do, if I thought it necessary, to show that the Jury Act upon which this objection imports to be founded is not mandatory, but directory, and the absurdity which would follow if there was a single departure from the number of details there mentioned, and the number of acts to be done by a variety of persons, none of them being the officers of the Sheriff (the person who arranges the proceeding), and not being the Sheriff himself, but being the High Constable, the Clerk of the Crown, and others over whom the Sheriff has no control. The notion, that an error in a single one of those particulars—the introduction into the jury list of a name which ought not to be there, or the omission from it of a name which ought to be there—is to set aside the whole array, is so monstrous that, even upon the face of the statute, I should say

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(a) 11 Cl. & Fin. 155.

H. T. 1864. that the objection could not for a moment be sustained: no case
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 v. that ought to have been in the jurors' books had been omitted.

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But besides these reasons which, upon the ground that I have stated, I give more generally than I otherwise would, I shall now proceed to advert to the question put by the House of Lords, to be considered by the Judges of England, and to which an answer is given by Chief Justice Tindal—that there was no ground for reversing the judgment on account of any objection which had been taken in that case to the array. I state that upon the authority of Chief Justice Tindal in *O'Connell v. The Queen* (a), where he goes at length into the law to show that no challenge can be taken to the array, but for unindifferency or other personal default in the Sheriff. The law is the same in England, where the Sheriff is not the person to make up the jury list any more than he is the person to do so in Ireland; and upon that ground Chief Justice Tindal shows that the law in England is the same.

The same point had been previously decided in *The King v. Edmonds* (b); and upon this ground I am clearly of opinion that nothing has been shown to sustain the objections taken to the rule allowing the demurrer to the challenge to the array, and that therefore we should not grant a *venire de novo*.

O'BRIEN, J., concurred in the judgment of the Court.

HAYES, J.

In this case a motion has been made, and a conditional order granted, at the suggestion of the Court, for a *venire de novo*. It is a case of criminal information, which was tried before me at the last Belfast Assizes. When the case was called on, and a jury had appeared, the defendant, who conducted his case in person, handed in a challenge to the array; and on its being read in open Court, the Counsel for the prosecution demurred, *ore tenus*. Instead of calling for an argument on the demurrer, I thought it right, at once, to allow it; and thus, by overruling the challenge, to let the case at once proceed. I was induced to adopt this course, because

(a) 11 Cl. & Fin. 248.

(b) 4 B. & Ald. 471.

it occurred to me that if, after argument, I should be induced to allow the challenge and overrule the demurrer, I would, in case I should be found to be in error, inflict a very serious injury on the prosecutor—indeed I may say on both parties, by dismissing their witnesses and refusing to proceed with the trial. Whereas, the correctness of my course in allowing the demurrer might at once be brought satisfactorily to test before the Full Court of Queen's Bench, on a motion framed as the present.

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I do not, therefore, regret either the course that has been adopted, or the discussion that has been had; as I trust it has put into a train for final settlement the important questions that have been raised before us.

The defendant has challenged the array of the jury on fourteen several grounds; and if any one of these grounds, set forth on the face of the challenge, be ruled sufficient in law, judgment ought to be given for the defendant. It behoves us then to consider these several cases, both in matter and manner; for it is quite possible that the defendant may have intended to put a good and valid objection on the record, yet from some mistake of his pleader the intention may not have been carried out. I will not occupy much time in discussing the form of the challenge. As a pleading, it is not free from exception. The pleader seems to have lost sight of some plain and obvious principles while engaged in planning *that* document. The challenge being in fact a charge against a public officer, made by one of the parties to the suit, and to be repelled by the other, it ought to set forth the grounds of charge with convenient certainty and precision; so that the opposite party, if so advised, might take issue upon it and be entitled to ascertain the precise matters to be proved or disproved, and to apply his evidence accordingly.

The first cause of complaint against the array is, that the jurors were summoned by virtue of a writ of *venire facias* and a writ of *distringas*; and the second cause is, that they were not summoned under the Sheriff's precept. Nothing is set forth as to the nature of the case, the mode of prosecution, or any of the proceedings taken; and if any case could be put in which the summoning of the jurors

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under writs of *venire* and *distringas* would be a correct course, then these causes ought to be overruled, by reason of the vagueness and uncertainty of the pleading. Again, the third cause is, that the jurors (*i. e.*, all the jurors) were not summoned six days before the Assizes; but none of the jurors are specified by name, to whom it is averred this objection is applicable. So also the eighth cause of challenge alleges the omission from the special jurors' list of several persons duly qualified to be on it; but not one of such persons has been specified, or that he was even in the jurors' book for the year,—the document from which the special jurors' list is to be selected by the Sheriff. But let us apply ourselves to the matter and substance of those first and second objections. The 109th section of the Common Law Procedure Act, 1853, enacts that:—"No jury process shall be necessary or used in any action; "but the precept issued by the Judges of Assize to the Sheriff, "to summon jurors for the Assizes, shall direct that the jurors be "summoned for the trial of all issues, whether civil or criminal, "which may come on for trial at the Assizes." It is contended that, by force of this enactment, the process by *venire* and *distringas* was altogether abolished. I am of opinion that is not so: it was only abolished "in any action." But by section 4 (the interpretation clause), the word "action" is to be understood to mean "any personal action brought in any of the said Courts." And a criminal information is not a personal action, as defined by section 6. The latter part of the 109th section, as above quoted, might at first sight seem to be more extensive than the former part; but a little consideration will correct that view. The Legislature, in the latter part of the clause, only meant to provide a substitute for the jury process, which it had abolished by the former part, as is indicated by the use of the adversative particle "but;" and this it does, not by an enactment that all issues, civil and criminal, shall be tried by the jurors summoned as there directed, but merely that the Judge's precept for return of jurors shall thenceforward be,—not in the form previously in use, and as prescribed by the 3 & 4 W. 4, c. 91, s. 10, as to the Criminal Courts, viz., directing the Sheriff to return a competent number

of good and lawful men, &c.,—but shall have a wider area, and shall direct the return of jurors, not for the Criminal Court alone, but for the trial of all issues, civil as well as criminal. The effect of that 109th section is then to charge the Sheriff with the duty of selecting and arraying a panel of proper jurors sufficiently large for all the purposes of the Assizes. By the 112th section of the Common Law Procedure Act it is enacted that the Judge's precept "shall direct the Sheriff to summon a sufficient number of special jurymen;" and the persons so summoned "shall be the jury for trying the special jury causes at the Assizes," . . . provided that the "Court or a Judge, in such case as they or he may "think fit, may order that a special jury be struck according to the "present practice"—(viz., as set forth in the 3 & 4 W. 4, c. 91, s. 25);—"and such order shall be a sufficient warrant for striking "such special jury, and making a panel thereof for the trial of "the particular cause." I think it very plain that, where such an order would be made, and a jury struck under it, even in an ordinary action, the power of selecting and arraying the panel is wholly taken from the Sheriff, and given to the officer of the Court, as mentioned in the Jury Act. After the jury has been thus struck, how then is "the panel thereof to be made for the trial of the particular cause"? The Common Law Procedure Act prescribes no mode of doing this. It gives no directions for the officer's furnishing the Sheriff with an authentic copy of the names of the jurors struck; nor does it impose on the Sheriff any obligation of summoning any persons save those whom he shall have himself previously selected and arrayed. How then is the panel of jurors to be made available for the trial of the cause? I answer, only by the pre-existing system of jury process; and which, as regards either a civil action or such a case as we are considering, it was never intended to abolish. The course then will be conformable to the ancient practice, to proceed to award a writ of *venire* on the roll. As the jury has been struck, there is no necessity for issuing the *venire*. It seems only to be awarded as preliminary to the writ of *distringas*, which issues, with the panel annexed, to the Sheriff, as his warrant and order to summon the jury.

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Such is the course which I think ought to be, and as I believe has uniformly been pursued, whenever a special jury is struck after the old system; and, as that is the course which has been adopted in the present case, the defendant has, in my opinion, failed to show that the cause which he has thus, firstly, assigned is a good cause of challenge.

His second cause of challenge is, that the jurors were not summoned under any precept by the Judges of Assize. The observations that I have made show that, in the class of cases I have referred to, the Sheriff's authority to summon the jury is derived from the *distringas*, and not from the precept; and there is nothing on the face of the challenge to show, nor could it in fact be shown, that the case now before us is not one of that class. That cause must also I think be overruled.

The third cause of challenge is, that the jurors (*i. e.*, all the jurors in the panel named) were not summoned "six days before the commencement of the present Assizes."

The fourth cause varies the expression, by saying that the jurors, *or any of them*, were not so summoned. Let us consider these two causes together, as involving the consideration of the want of a six days' summons as a ground of challenge.

A good many cases have been cited to us: most of them, as might be expected, were decided at *Nisi Prius*. In some of them the conduct of the Sheriff was called in question; and in others default was attributed to the party. I do not think it possible to reconcile all those cases, and to derive from them any clear and settled principle. Let us have reference then to the statute on which those cases form a commentary. The duty of the Sheriff, that is here said to be violated, is derived from the 18th section of the 3 & 4 W. 4, c. 91. It enacts that "The summons of every man to serve on any jury, common or special, in any of the Courts aforesaid, shall be made by the public officer six days at least before the day on which the juror is to attend, by showing to the man to be summoned, or (if he shall be absent from his usual place of his abode) by leaving with some person there inhabiting, a note in writing, under the hand of the Sheriff, Sub-sheriff, or other

"proper officer, containing the substance of such summons." I am of opinion that this enactment, as to the six days' summons, is merely directory, and that a six days' summons is not essential to the validity of the proceeding.

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The names of jurors having been selected, and duly arrayed and empaneled by the Sheriff, and left by him for public inspection in his office during seven days before the Commission day (2 & 3 W. 4, c. 91, s. 14; 16 & 17 Vic., c. 113, s. 110), the next great purpose is to secure the attendance of "a competent number of good and lawful men of his county." This being the end to be achieved, the statute proceeds to set forth the means by which that end may be attained. But it is plain that those means, although they ought never to be unnecessarily lost sight of or departed from, are not essential. If the Sheriff can procure the attendance of the jurors, though he were not to give them even twenty-four hours' notice, no mischief would be done. And it would be imposing a great and needless hardship on the officer if, within one day after the time allowed for publication of his panel, he should be obliged to serve every juror on that panel resident within his county. The existence of such an obligation would operate as a strong inducement to the Sheriff to select the jury, not from the general body of the county, but from those residing in the immediate vicinity of his office. The enactment, both as to the time and manner of summoning, was introduced for the ease and benefit of the juror, for the better securing his punctual attendance. If a six days' service were held to be essential, then a jury panel summoned only five days before, though they should all attend, would not be available for any useful purpose; and yet the Sheriff could not be punished under the 34th section for the mischief and confusion he had occasioned; he having given the jurors a four days' notice, as required by that section. So again, to hold that the six days' summons was essential in every case would virtually nullify the 37th section, as to juries *de mediatate linguæ*, the necessity for which is only apparent, after the Assizes have actually begun. The result is, that the only reasonable mode of construing the 18th section is by

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holding it to be directory, as was done in *The Queen v. Conrahy* (a), and afterwards in *Fogarty v. The Queen* (b),—a case which underwent the full and careful consideration of this Court, and which I take to be a solemn decision on the very point now before us.

The fifth, seventh, and eighth causes of challenge seek to bring into consideration the conduct of the Sheriff, with respect to the making of the special jurors' list. But how can this, since the Jury Act (for it never could have existed before), be made a ground of challenge to the array of a panel returned in any particular case? and especially in a case in which the array has not been made by the Sheriff, but by the officer of this Court, and in which the party challenging has seen that special jurors' list, of which he now complains, returned by the Sheriff to the Clerk of the Crown; has seen that officer select the forty-eight names from it; and has afterwards, as we may presume, attended to reduce those names; and all this done without the slightest remonstrance on his part. If he had any objection he ought to have brought his complaint at once, and in the first instance, before the Court, that the proper remedy might be devised and applied. No prejudice is shown to have resulted to him from this imputed default. And it must be borne in mind that the 36th section of the Jury Act imposes a penalty of £100 on the Sheriff for any such wilful default as is now alleged. Evidently regarding this as a sufficient mode of securing performance of the Sheriff's duty, and not having thought proper to give any express remedy by way of challenge.

The sixth cause of challenge is obscurely framed. It is uncertain whether it is meant to convey an imputation on the Clerk of the Crown, for not selecting the forty-eight jurors from the special jurors' list; or an imputation on the Sheriff, for having handed to the Clerk of the Crown, for selection of jurors, some book which was not the true special jurors' list. Whichever be the meaning, I am of opinion that the observations I have just made afford sufficient grounds for overruling the challenge.

The ninth, tenth and eleventh causes of challenge impugn the conduct of the barony constables, Justices, and Clerk of the Peace,

(a) 1 Cr. & Dix, 56.

(b) 10 Ir. Law Rep. 53, 62.

or some of them, in the preparation of the jurors' book; but no particulars are given, either as to the persons assailed, or the names wrongfully omitted or inserted. Be that as it may, it is plain this is no ground for a challenge to the array; and if authority were wanting, it is found in *The Queen v. Fitzpatrick* (a), where a similar challenge was overruled by Doherty, C. J., in whose observations I entirely concur.

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The remaining causes of challenge (viz., the twelfth, thirteenth and fourteenth) have been given up in argument, and therefore nothing further need be said as to them. The result of the whole matter is, that the demurrer taken in the Court below was rightly allowed; and that the motion for a *venire de novo* ought now to be refused.

FITZGERALD, J.

I concur in the decision of the Court that the cause shown against this conditional order should be allowed. But in consequence of the very grave and important question that has been debated before us, especially upon the third and fourth causes of challenge, which may be taken as one and the same, I wish to state the grounds upon which I concur in the judgment.

The case appears upon the record as a criminal information, but was tried at *Nisi Prius* by the warrant of the *Attorney-General*. It still is, however, a criminal case in all its characteristics, as truly as if it were an ordinary indictment for a misdemeanour. Some discussion took place as to the form of the proceedings: and it was gravely argued by Mr. *Brewster*, that this case was to be taken as not tried by a special jury at all, but as an ordinary criminal case tried by a common jury summoned under the ordinary precept of a Judge of Assize. But I then pointed out that this case ought to be decided upon the facts as they really were; that they should be put truly upon the record; and that if there was any mistake there it ought to be amended. And from the record it appeared that the case was tried at *Nisi Prius*: and that an application had been made for a trial by a special jury struck under the old practice; that the

(a) 1 Cr. & Dix., C. C. 513.

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special jury was actually struck under the old system; that a *distringas* issued; and that the Sheriff returned the writ with the panel annexed, and the ordinary return. There is another statement on the face of the *postea*, "that the jurors of the jury, being called, came;" and it was argued that that was a statement that the whole twenty-four jurors appeared, whereas the facts were that ten only of the jurors appeared. And if it was necessary to do so, I, for one, think that the *postea* ought to be amended according to the true state of facts.

But another objection was made to another averment, upon which a great deal more may turn—namely, that the challenge itself, after stating that the prosecutor and the defendant in their proper persons came, then makes this statement:—"And the jurors of the jury also impaneled also came." It was argued, that this was a statement, not that the jury who tried the case came, but that all the jurors impaneled—the whole twenty-four of them—came, appeared; and that therefore there was nothing to complain of. It may be very difficult to get over that statement. The only causes of challenge of importance are the third and fourth; which may be taken together, because they merely put in different forms the same objection, that is to say, that *none* of the jurors in question were summoned six days before the commencement of the *Assizes*. There is no allegation that this omission of the Sheriff to perform his statutable duty arose from fraud in any person—from any fraud or design in the Sheriff, or in the Sheriff's officer, or from any fraud upon the part of the prosecutor.

Two answers were given by the prosecutor's Counsel: first, that the provisions of the 3 & 4 *W.* 4, c. 91, s. 18, if applicable to criminal cases, were not mandatory, but were directory only; and, secondly, if that section was mandatory, and applicable to criminal cases, yet that the omission of the Sheriff to perform this particular statutable duty was not any matter of challenge to the array.

As to this second answer, it is very plain to me that if the 18th section of the statute applies to criminal cases, and is mandatory, the Sheriff's omission to perform that duty is a good ground of challenge to the array. Now the cases which were referred to in the

argument determine that a challenge to the array must be on the ground of the personal unindifferency or personal default of the Sheriff; but the omission to summon the jurors, as the statute requires, *is* personal default on the part of the Sheriff, whether it arises from his own act, or from the act of a party whom he employs to perform his duty. Is the 18th section mandatory? In other words, are the parties entitled to say that the summoning of the jurors six days before the commencement of the Assizes is essential to the legal constitution of the array? That is a question of great constitutional importance, and to be considered with the most anxious care, if it has not been concluded by authority. If the 18th section is not mandatory, or if this challenge to the array does not lie for the omission of this particular duty, I am not able to point out any adequate remedy for the subject. There are remedies in civil cases, as for instance by application for a new trial; but in criminal cases no adequate remedy exists that I can point out. Suppose the case of a trial for a capital felony, and the conviction of the defendant. An application for a new trial is not open to the accused. So that, in criminal cases especially, the subject is without any adequate remedy if there is no challenge to the array, for this default of the Sheriff: on the other hand, great inconveniences will flow from holding that this *is* a subject of challenge to the array. For then it must lie for the plaintiff as well as for the defendant; for the default is in the Sheriff; not in the party; and it must lie in civil as well as criminal cases; and for the prosecutor as well as for the defendant.

I also agree in the opinions of my Brothers O'BRIEN and HAYES that we have a decision of this Court in *banco* upon the very question now before us, pronounced in the cases of *Hayes v. The Queen* and *Fogarty v. The Queen* (a), which are reported together. In many respects, I must say that the reported judgment in these cases is unsatisfactory. But, however unsatisfactory it may be upon some of the grounds on which the judgment is rested, it is a

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(a) 10 Ir. Law Rep. 53.

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solemn decision of this Court *in banco* upon this very point, and a decision not appealed from, and which we cannot now overrule.

I have said that the decision in that case is in many respects unsatisfactory; because it is not easy from the report of the case to ascertain exactly upon what principle or ground the decision rests, and some of the propositions laid down, to ground the judgment, seem to me to be wholly unsustainable. In the first instance, Blackburne, C. J., is reported to have said:—"The whole substance of the charge amounts to this, an omission by the person or persons employed to summon the jury. But this omission does not inculcate the Sheriff, and affords no ground for arguing that the panel was not duly arrayed."

In my judgment, that observation, which, if well-founded, would have gone to the whole case, cannot be sustained.

The default alleged there was the default of the Sheriff, through his summoning officers. Whose officer is the summoning officer? The Sheriff's. Upon whom is the duty thrown by law—upon whom has it been cast from the earliest period—and upon whom now rests the duty of summoning the jury? Upon the Sheriff. And I am at a loss to see upon what ground it can be said that the default of the Sheriff's officer, for whose acts the Sheriff is responsible, is not his own default, just as much as if the Sheriff had undertaken to do the duty himself, and had failed to perform it.

Again, the Chief Justice (Blackburne) is reported to have said:—"In my apprehension, it is very plain, though perhaps it is not necessary to decide that question, that the 18th section had no reference to jurors required to serve in Criminal Courts." Again, it appears to me that *this* is entirely unsustainable.

It is clear, upon an accurate review of the Jury Act (3 & 4 W. 4, c. 91), that its 18th section applies to criminal as well as civil causes, save in a criminal case where a Judge of Assize directs the Sheriff to summon a jury forthwith. But subject to these observations, Chief Justice Blackburne, in *Fogarty v. The Queen*, solemnly announced the judgment of the Court, that the 18th section is not mandatory, and is directory only; in other words, that a strict observance of its provisions is not essential to the validity of the jury

as they stood arrayed. Therefore, if that judgment is correct, the challenge in the present case fails; and if it is incorrect, it nevertheless binds this Court. If that decision is to be overruled, it must be by some superior tribunal.

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I have said that upon the construction of the statute itself, and independently of the authority of that case, I have endeavoured to form a judgment upon this principal question; and upon a careful review of the principal provisions in the statute, I think that the provisions of the 18th section are not mandatory.

During the argument, I was much pressed by the difficulty of getting over the provisions of section 34; for how can it be correctly urged that, as between the parties who have no control over the Sheriff, it is necessary to the validity of the proceedings that the jury should be summoned at least six days before the commencement of the Assizes, when, under the 34th section, the Sheriff is liable to be fined only if the jury are not summoned at least *four* days before the commencement of the Assizes?

In the 17 & 18 *G. 3 (Ir.)*, c. 45, the six-day clause was introduced in the same express terms then as now. By the 4th section of that Act, applicable to special jurors, it was provided, "that the said jury so struck as aforesaid shall be the jury returned for the trial of such issue, and shall be summoned by the Sheriff, or other officer appointed to return the same, *at least* six days before the Assizes or Sitting at which such issue is to be tried."

It was in reference to that provision that the observation in *Edwards v. Harding (a)* was made. It is only the *dictum* of a Judge, or rather the impression of a Judge, as to what had been decided in an unreported case—namely, that that section is not mandatory, but is for the benefit of the jurors only; and that it is not to render invalid, as between the parties, the proceedings, by reason of the Sheriff's non-compliance with that provision. But the statement there made is important to show that this had been long considered to be the law. The 7th section of the same statute is, "that if the Sheriff or Sheriffs, or such other officer as shall be appointed to return such jury as aforesaid, shall omit or neglect

(a) 1 Ver. & Scri. 100.

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"to summon, or cause to be summoned, by a note in writing, every
 "person so struck or returned as aforesaid, at least six days before
 "the Assizes or Sittings whereat such issue is to be tried, he shall
 "forfeit such fine, not exceeding £50, and not less than £10, as
 "the Judge before whom such issue is to be tried shall think
 "reasonable, for every such offence, and that the said Judge shall
 "estreat such fines."

There are two sections requiring the jurors to be summoned at least six days before the commencement of the Assizes, and yet it had been held that, in imposing a penalty on the Sheriff for neglecting to summon the jurors six days before the commencement of the Assizes, the statute was not mandatory, but was directory only, and for the protection of the jurors. But how much stronger is the case under the present Jury Act? It is a deliberate departure from the old law; and while it imposes a duty upon the Sheriff, under the 18th section, to summon the jurors at least six days before the commencement of the Assizes, it only in the 34th section imposes a fine for neglecting to summon at least *four* days before the commencement of the Assizes. Viewing the case in that light, and without going through the entire of the reasons, my opinion is that the 18th section is not mandatory, and that it is directory only; and that the non-observance by the Sheriff of its provisions does not affect the legal constitution of the jury as arrayed. I may also add that there is a want of an allegation of fraud on the part of the Sheriff, or of contrivance on the part of any one. And from the report of the case of *O'Connell v. The Queen* (a), where a great deal was rested upon the argument of the challenge, that the abstraction of the names from the jury list was by the fraud of some person, and not a mere omission of the Sheriff to perform his duty; the allegation was, that it was the fraudulent act of some person, not named, with a view to deprive the defendant of a fair trial: and this view is further borne out by the case of *The King v. Hunt* (b), which was not referred to in the argument of this case. It is, however, a well-known case. It was an information by the *Attorney-General*, for

(a) 11 Cl. & Fin. 155.

(b) 4 B. & Ald. 430.

a libel. There was a special jury struck, and ten only attended, and two talesmen, accordingly, were sworn on the jury. The defendant was tried and convicted; and, afterwards, Denman moved for a new trial upon affidavits that two special jurymen, who had not been summoned, were absent; and that the defendant and his attorney were wholly ignorant of that fact until after the trial was over.

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However, in the course of the argument for the new trial, all the arguments were suggested that have been urged here for the accused. It was said that difficulty would beset his course if he was not to have a new trial upon that ground. But Bayley, J., said, "If we were to accede to this application, it would be equally "competent to the Crown, in case of an acquittal, to have a "new trial as of right; and therefore our granting a rule in this "case would tend to deprive defendants of the protection which "the law at present gives to them; and this would apply to all "cases, criminal as well as civil. It would surely be a monstrous "proposition to contend, that, after an important question has been "determined at *Nisi Prius*, the losing party might have a new trial, "because the Sheriff had omitted to summon one common jurymen "within the whole panel."

Holroyd and Best, JJ., concur in the judgment, pointing out strongly, as an additional ground, that there was no fraud. Upon that ground I think it is an authority deserving of some attention; though, possibly, the reasoning of Bayley, J., may not be very satisfactory, that the parties were not without a remedy; for if it was a case of felony, and the defendant was convicted, I am at a loss to see how, even if a fraudulent contrivance was alleged, the defendant could have a motion for a new trial; how the Court could aid him by granting a new trial: and it is very doubtful whether he would not be left to make an application to the discretion of the Crown to remedy the grievance.

Upon these grounds it is that I concur in the rule of the Court, that the cause shown should be allowed.

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COURT OF CRIMINAL APPEAL.

THE QUEEN *v.* THOMAS GALVIN jun.,
 THOMAS GALVIN sen., and MICHAEL FARRELL.*

May 10.
 June 1.

THE following case was reserved from the Spring Assizes, 1865, for the city of Limerick, by Mr. Justice O'BRIEN:—

"In this case, which was tried before me at the last Assizes for the city of Limerick, the indictment was for manslaughter. The first count charged the three traversers with having killed John Hickie. The second charged Thomas Galvin jun., with killing him, and charged the other two traversers with aiding and abetting therein. On the trial, Thomas Galvin sen., and Michael Farrell were acquitted, and Thomas Galvin jun., was convicted."

"The following information was offered in evidence at the trial, on the part of the Crown, viz.:—

down the statement of E, in writing; read it over to E, in the presence and hearing of the prisoners, of whom A and B cross-examined E. To the written statement so read, E affixed his mark. E having died before the trial, this statement was tendered in evidence against the prisoners, under the 14 & 15 Vic, c. 93, sec. 14. It began:—"The information of E, of &c. Informant being duly sworn on his oath deposed as follows." It was signed by the J. P. before whom it was taken. Prisoners' Counsel objected to the admission of the document in evidence; and the point being reserved on the following objections:—

First; That the deposition ought to be taken by the J. P. himself.

Secondly; That it had no caption.

Thirdly; That nothing to show on its face that the prisoner had been made aware of the charge on which he was in custody.

Parol evidence was given that the document had been read over to the prisoners previous to the cross-examination.

Held (dissentientibus O'HAGAN, J., HUGHES, B., HAYES and CHRISTIAN, JJ.), that the document was not admissible, as it was not preceded by a statement of the charge to which it had reference.

Held (per CHRISTIAN and HAYES, JJ., HUGHES, B., and O'HAGAN, J.), that all the statute requires is that the charge should be made to the Magistrate before he proceeds to take the deposition.

Semble—That the Justice need not take down the deposition himself, but it is sufficient if he is present and attending to the work of the clerk.

* *Coram* MONAHAN, C. J., PIGOT, C. B., CHRISTIAN, O'BRIEN, HAYES, JJ., FITZGERALD, HUGHES, DEASY, BB., and O'HAGAN, J.

“‘City of Limerick, to wit.
 “The Queen v. Thomas Galvin sen., Thomas
 Galvin jun., and Michael Farrell.’” } “The information of *E. T. 1865.*
 “John Hickie of Gridiron- *Crim. Appeal.*
 “lane, in the city of Lime- **THE QUEEN**
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“rick, fisherman. Informant, being duly sworn on his oath, saith
 “as follows:—That on Tuesday, the 20th day of September inst.,
 “I had an argument with Thomas Galvin jun., at the racecourse;
 “he was after striking James M’Inerney, and I struck him with a
 “stick. I returned to Limerick at about seven o’clock the same
 “evening, when I saw the prisoners Thomas Galvin sen., and
 “Michael Farrell, in contact with James M’Inerney; I went
 “between them to separate them. I made a blow at the prisoner
 “Thomas Galvin sen.; I do not know whether I hit him or not;
 “the prisoner Michael Farrell then caught me and held me, when
 “the prisoner now present, Thomas Galvin jun. stabbed me with
 “some sharp instrument under the arm, then, in the belly, at both
 “sides. I put down my hand and felt the blood coming, and
 “immediately went to the hospital.”

“Cross-examined by the prisoner Michael Farrell:—‘You spoke
 “nothing to me, but caught me by the cravat; you said to me, let
 “go of me; for I respect your years; I let go of you; you had one
 “hand loose, and you had hold of me with the other. Thomas
 “Galvin jun., was there at the time I had a hold of you.’” “Cross-
 “examined by Thomas Galvin sen.:—‘I struck you because you
 “struck M’Inerney.’ Further examined by Michael Farrell:—‘It
 “was while you had a hold of me that I was stabbed.’”

“Sworn before me, at the city of Limerick, this 23rd day of
 “September 1864. J. O’SHAUGHNESSY, J. P.—Informant bound
 “in the sum of £50 to prosecute when called on.

His
 “JOHN M. HICKIE.”
 mark.

“The following evidence was given at the trial as to said infor-
 “mation:—First witness for the Crown (J. O’Shaughnessy, Esq.)—
 “‘I am a J. P. for the city of Limerick. I knew John Hickie
 “(deceased). I saw him on the evening of the 23rd of September
 “last, in Barrington’s Hospital in this city, in bed, in a bad state
 “of health. I took an information from him at that time. I saw
 “Hickie put his mark to it. Before that, the prisoners T. Galvin

E. T. 1865. "sen. and M. Farrell cross-examined Hickie. T. Galvin jun. was
Crim. Appeal. "present. I cannot say that the three prisoners were present the
 THE QUEEN "whole of the time."—[Identifies the information]—"I cannot
 v. GALVIN. "state from my recollection whether I read it to Hickie or not."

"Second witness (E. M. Beauchamp):—"I am Clerk of Petty
 "Sessions."—[Information produced]—"I was present when that
 "was taken. Hickie was then in bed. The information was written
 "out by me. Mr. O'Shaughnessy, the head constable, the three
 "prisoners, and some others, were present in the room the entire
 "time that I was writing the information. I had gone into the
 "room with Mr. O'Shaughnessy and the three prisoners, up to the
 "bed where Hickie was. I then swore Hickie, in the presence
 "of and before Mr. O'Shaughnessy, that the evidence he would
 "give before the Magistrates in the charge he had against the
 "prisoners should be the truth, the whole truth, and nothing but
 "the truth; but I did not mention what the charge was. I
 "then asked Hickie certain questions, and I took down his answers
 "truly, and read over each answer to him after I had taken it
 "down, as I went on. I did that with all the questions that I
 "put, and the answers; and, when I had taken down the whole
 "of his answers to my questions, I read the whole over to him
 "truly; and I told the three prisoners that they were at liberty
 "to cross-examine him, and ask him any questions they liked.
 "All the answers given by Hickie, and what I took down as
 "above mentioned, were given by him and read by me in the
 "presence and hearing of the three prisoners. The prisoners
 "M. Farrell and Thomas Galvin sen. then cross-examined Hickie;
 "and I took down truly the answers he gave to their questions;
 "and I read them truly for Hickie, in the presence and hearing
 "of the prisoner; and when those answers were taken down, I
 "I then read over truly the entire information again for Hickie,
 "in the presence and hearing of the prisoners. After that was
 "done, I put the paper before Hickie, and gave him a pen: he
 "held the pen, with which I put his mark while he held it; he
 "then acknowledged it to be his mark, and I then handed it to
 "Mr. O'Shaughnessy, who signed it in my presence. I did not

“read it again, to or in the hearing of the prisoners, after it was so signed. Mr. O’Shaughnessy was present, and quite near me, the whole time. Hickie died the following morning. It was not, on the occasion of taking down the information, stated at any time in the presence of the prisoners, or of any of them, either by me or by any other person, what the charge against the prisoner was. I merely swore Hickie, as above mentioned, that the evidence he should give, in the charge he had against the prisoner, should be the truth, &c. Nothing was said by Hickie in the presence of the prisoners, either before or after I swore him, about his state of health. Hickie was very ill at the time.’”

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“The Crown proposed to read the informations. Prisoners’ Counsel objected, on the following grounds:—First; that there was no caption to it: *Regina v. Newton (a)*; *Roscoe*, p. 68. Secondly; that it did not appear that Hickie was sworn by Mr. O’Shaughnessy; and that, on the contrary, it appeared he was not. Thirdly; that the document did not state what the charge against the prisoner was, and that the document was not in conformity with the Petty Sessions Act, 1851. Fourthly; that the charge against the prisoner was not stated in the caption of the document, and was not stated to Hickie, or in the presence of any of the prisoners, either at the time of Hickie being sworn, or of taking his information, or at all on that occasion. Fifthly; that the document was not read over to or for the prisoners after it was completed by the mark of Hickie, and the signature of Mr. O’Shaughnessy. Counsel for the Crown relied on *Regina v. Langbridge (b)*, and contended that the document was admissible independent of the statute. I admitted the document, subject to the decision of this Court.”

“Several other witnesses were examined for the Crown; but it is not necessary, for the purposes of this case, to give their evidence in detail. With respect to Thomas Galvin sen., it appeared that the conflict between him and M’Inerney (which is stated in Hickie’s information) took place some time previous to the

(a) 1 F. & F. 641.

(b) 1 Den. C. C. 448.

E. T. 1865. "stabbing of Hickie. At the close of the case for the Crown, it
Crim. Appeal. "was contended that there was not sufficient evidence to go to
 THE QUEEN "the jury to sustain the charge against Thomas Galvin sen. I
 v. "was of that opinion; and Crown Counsel did not press the case
 GALVIN. "against him. I therefore directed the jury to acquit him, which
 "they accordingly did. With respect to Thomas¹ Galvin jun., the
 "evidence of some of the Crown witnesses corroborated that ap-
 "pearing against him on the information. As to Farrell, it was
 "questionable whether, upon the entire of the evidence, he held
 "Hickie at the time of the stabbing, as would appear from the
 "information, or whether he in any way aided and abetted in
 "the stabbing. One of the witnesses examined for the prisoner
 "(head constable O'Connor) stated that, on the night of the stabbing
 "(20th of September), he saw Hickie in Barrington's Hospital, and
 "that Hickie (who was then collected, and able to answer witness's
 "questions) told witness it was Thomas Galvin sen., father of Tho-
 "mas Galvin jun., who stabbed him, and that Thomas Galvin jun.
 "and M. Farrell were aiding and abetting. This contradiction
 "between the statement of Hickie to the constable and that in his
 "information, was relied on by prisoners' Counsel in his address to
 "the jury."

"The jury acquitted M. Farrell, but found Thomas Galvin jun.
 "guilty. The question for the Court is, whether such information
 "is legally and properly receivable in evidence."

The argument turned chiefly on the 14 & 15 *Vic.*, c. 93, s. 14,
 par. 1:—"In every case where any person shall appear, or be
 "brought before any Justice or Justices, charged with any indict-
 "able crime or offence, such Justice or Justices, before committing
 "such person for trial, or admitting him to bail, shall, in the pre-
 "sence of such person, who shall be at liberty to put questions
 "to any witness produced against him, take the depositions
 "(A b), on oath and in writing, of those who shall know the
 "facts of the case; and such depositions shall be read over to,
 "and signed respectively by, the witnesses, who shall have been
 "so examined; and shall also be signed by the Justice, or one
 "of the Justices, who shall take the same; and if, upon the
 "trial of the person so accused, it shall be proved by the oath

"of any credible witness that any person whose deposition shall have been so taken is dead, and that such deposition was taken in the presence and hearing of the person accused, and that he or his Counsel or attorney had an opportunity of cross-examining such witness, it shall be lawful to read such deposition as evidence at the trial, without further proof thereof, unless it shall be proved that the same was not signed by the Justice purporting to have signed the same."

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Michael O'Loghlin, for the prisoner.

There are only two grounds on which this could be admitted in evidence—first, as a statement made in the presence of the prisoner, and not contradicted; second, as a statement on oath admissible under the statute 14 & 15 Vic., c. 93. That statute refers to the form A b; and in that form we find the words "who stands charged that," showing that the charge should be stated. As to the second objection—the statute intends that, after the oath has been administered by the Justice, as in the 15th section, par. 4, stated, the witness should be examined by the Justice himself, in order that he should see that the answers given in the document are the true answers of the witnesses. The object was, that the character of the Magistrate should afford some guarantee that the judicial office was properly discharged. Suppose the Magistrate present, but in another part of the room, he might be quite ignorant of what was going on. Here the clerk did everything. As to the caption, it is said—in *Regina v. Newton* (a),—unless it appears that the prisoners were charged with an indictable offence, this deposition cannot be received in evidence against them. The caption is a certificate that the evidence was properly taken. As to the case cited by Mr. *Brereton* below—*Regina v. Langbridge* (b),—there the declaration was held good, though the word "unlawfully" was not in the statement of the charge in the caption. The words were, "who is now charged before me this day for obtaining money," &c. Every person who read it would know what the charge was. At the end of the judgment, the Judges say:—

(a) 1 F. & F. 641.
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(b) 1 Den. C. C. 448.
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E. T. 1865. "It may not, however, be improper to observe that the case states
Crim. Appeal. "that the charge preferred against the prisoner was that of obtain-
 THE QUEEN "ing the promissory note and securities by means of false pretences,
 v. GALVIN. "and that the prisoner was informed of this charge by the commit-
 "ting Justice."—[CHRISTIAN, J. What do you say to section 36
 of the 14 & 15 Vic., c. 93, as to efficacy of the forms in the sche-
 dule?—That section requires that the forms shall be sufficient in
 substance and effect. The object of stating the charge is, that the
 prisoner may be able to cross-examine the witness; which he cannot
 do, if he does not know the exact nature of the charge.—[MONA-
 HAN, C. J. The only question is, did he understand what the
 charge was; for that is all that is required. When he heard the
 man say he stabbed him under the arm, how could he be ignorant
 what the charge was?—In *Johnson's case* (a), it is held only that
 there need not be a separate caption to each information.

Brereton (with him *De Moleyns*), for the Crown—

As to the information being drawn up by the clerk—cited sec-
 tion 5 of 14 & 15 Vic., c. 93, par. 3, "he shall also prepare all
 informations," &c. It may not have been stated, "you stand charged
 with such and such an offence;" but in substance the prisoner must
 have known what the charge was. The clerk says all the answers
 were read out by him in the presence and hearing of the prisoner.—
 [PIGOT, C. B. Does it not appear that not only were the answers
 taken down in writing, but the whole was read in the hearing of the
 prisoner before he was asked to cross-examine?—Yes. This case
 is stronger than *Langbridge's case*. There, there were no words
 indicating an indictable offence. The word "stab" would of itself
 support an indictment.—[CHRISTIAN, J. How far is the argument
 for the prisoner to be pushed? Would it go this length, that the
 pleader must mould his indictment to suit the charge set forth in
 the caption of the deposition, or lose the benefit of that deposition?]
 —*Regina v. Mullen* (b).—[O'BRIEN, J. In that case all the mate-
 rial provisions of the statute were complied with. Does it appear in
 evidence that this man was brought before the Justices, charged with

(a) 2 Car. & K. 355.

(b) 9 Cox, Cr. Cas. 339.

an indictable offence?—I say that it does. The object of this Act of Parliament was to facilitate the proof of depositions. The admission of depositions is discussed in the *note* to *Regina v. Smith (a)*. —[FITZGERALD, B. It is clearly essential that the examination should take place in the presence of the prisoner. Is it not clear also that the prisoner should be informed substantially what the charge against him is, and not be left to collect it from the evidence he hears, to see whether this will prove any charge against him? If so, the only way he can know the charge is, that by attending to the evidence he may make it out.—MONAHAN, C. J. We have the common practice of informations sworn before a Justice of the Peace, in the absence of the prisoner, and then re-sworn his presence when he is arrested.]—Yes: the only thing done in these cases is to identify the prisoner.—[FITZGERALD, B. But he is informed before of the nature of the charge.—PIGOT, C. B. The object of the Legislature was to bring the prisoner to understand at once the nature of the charge, in order that his mind might be applied at once to it before the evidence was signed at all. In *Regina v. Langbridge* the charge was taking money; and he knew it was a charge of a criminal offence that was made against him.]—It might be that the Magistrate had no opportunity of ascertaining the nature of the charge until he asked the questions.—[HUGHES, B. It is worthy of notice that the other prisoners cross-examined the witness very pertinently, though they had no further means of knowing the charge than from this witness.]—In *Regina v. Newton* the decision might have gone upon a variety of grounds.—[CHRISTIAN, J. There the document was manifestly intended as a dying declaration.—FITZGERALD, B. In that case the caption belonging to certain depositions was sought to be applied to the last of the series, which I assume was properly signed by another Magistrate, because it is not stated that these were not so signed.]—It is stated that it appeared to have been taken before Mr. Bailey, which negatives the supposition that it was signed by Mr. Jeffcott.—[PIGOT, C. B. Are we to hold this case an authority, because it might have been decided

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E. T. 1865. on grounds other than those in the judgment of the Court?]
Crim. Appeal.—I do not trouble myself with this decision, but rest upon the one
THE QUEEN I have cited, in my favour. The decision there was equal to a
v. considered judgment of the Court of Criminal Appeal. The ques-
GALVIN. tion here is, is it absolutely necessary that the offence should be
 first distinctly stated to the prisoner, independent of the evidence
 he may hear: *Taylor on Evidence*, p. 455, vol. 1; p. 457, 4th ed.

O'Loghlin, in reply.

As to the practice of Justices mentioned by Chief Justice
 MONAHAN, it is condemned, in the case of *Regina v. Walsh (a)*,
 by Mr. Justice Perrin.—*Regina v. Beeston (b)*.—[CHRISTIAN, J.
 That case shows that it is always a question of substance, and not
 a question of form.]—As to the observation of Mr. Baron HUGHES,
 just take the parts of the informations applying to the other pri-
 soners, and see what charge could be got out of them. I should infer
 they were charged with an assault on M'Irnerney. As to the duty
 of the Clerk of Petty Sessions—the 5th section only applies to him
 in Petty Sessions; out of Petty Sessions, he is clerk no longer:
Candle v. Seymour (c); *Regina v. Clerke (d)*.

Cur. adv. vult.

O'HAGAN, J.

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June 1.

This is a case reserved by my Brother O'BRIEN for the con-
 sideration of the Court. I shall briefly state the circumstances
 on which the question raised before him, and now to be decided,
 has arisen. Three persons, Thomas Galvin sen., Thomas Gal-
 vin jun., and Michael Farrell, were indicted for manslaughter,
 at the last Limerick Assizes. In the first count of the indict-
 ment the three prisoners were charged with killing John Hickie.
 The second count charged Thomas Galvin jun. with killing John
 Hickie, and the other prisoners as aiders and abettors. Thomas
 Galvin sen. and Michael Farrell were acquitted; and Thomas
 Galvin jun. was found guilty. In the course of the trial, the
 Crown offered in evidence the information or deposition of the

(a) 5 Cox, 115, 125.

(b) 1 Dearsley, Cr. C. 405; 6 Cox, 425.

(c) 1 Q. B. 889.

(d) 2 F. & F. 2.

deceased John Hickie. It was in these terms—[Read information.]—The question for the Court is, whether, having regard to the form of this information, and the proof given at the trial as to the mode of taking it, it should have been admitted in evidence by the learned Judge? I shall state the proof so given, as, on one of the points raised by the prisoners' Counsel, it is material.—[Read evidence, p. 453]—The Crown offered the deposition in evidence. The prisoners' Counsel objected to the reception of it, on five grounds, which are set out in the case.—[Read grounds, p. 455.]

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The Counsel for the Crown pressed the admission of the evidence, and the learned Judge admitted it, intimating his intention of reserving the question as to its admissibility for the Court of Criminal Appeal; and, accordingly, we are now to dispose of that question.

The points relied on in argument were substantially three, which I shall discuss in the order in which they were presented:—First; that the information was not taken by the Magistrate, but by his clerk. Secondly; that it has no caption. Thirdly; that the charge against the prisoner was not stated to him, or in his presence, at the time the information was taken, save in so far as it was to be gathered from the evidence itself. I think that these points exhaust the case made by the prisoners' Counsel at the Bar.

As to the first, the evidence appears to me to show that there is no foundation for it. The Petty Sessions clerk swore and examined Hickie in the presence of the Magistrate; wrote out the information in the Magistrate's presence; and wrote out the cross-examination of the prisoners in his presence also. He was present, and within hearing of everything that was said, and within sight of everything that was done, throughout the whole transaction. He was "quite near" the clerk during the entire period. "*Qui facit per alium, facit per se;*" and it seems to me that the acts of the clerk were his acts, supervised by him, and authorised by him; and that his magisterial duty was as fully and faithfully done, as if he had proceeded without the intervention of any clerk at all. This is not the case suggested, in the

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course of the argument, of the preparation of a deposition in the prisoner's absence, and the reading of it in his presence, with a view to the cross-examination of the witness, whose statements he has not heard until they have been reduced to writing. I think that such a course of proceeding is a wrong to the prisoner, and a fraud upon the law. He is entitled to the fullest opportunity of cross-examination; cross-examination is correlative with examination; and it cannot be conducted effectually unless the cross-examiner has heard the witness, whose accuracy and veracity he desires to test, utter every word of the deposition in his own presence. He is entitled to observe the demeanour, and note the tones, and mark the gestures, as well as to listen to the words, of that witness: and if any magisterial practice exists which deprives him of this essential advantage, it is, in my mind, very reprehensible. But, no such objection applies in the case before us. The Magistrate was warranted in requiring the assistance of the clerk; and his use of it did not derogate from his own performance of the duty for which he was responsible.

The second and third points of objection should be considered together; and they arise upon the construction of the first clause of the 14th section of the 14 & 15 Vic., c. 93, taken in connection with the form (A b) in the schedule to that Act, and the 36th section.—[Read section 14, and referred to schedule].—The information received in evidence has not the caption, as it is, I think, improperly called, or the heading or recital contemplated by the form (A b); and I do not find that, before the taking of it, any formal charge was made to the prisoner himself. On the point as to the caption, it is insisted, on both sides, that there is decisive authority—for the prisoner, *Regina v. Newton* (a); and for the Crown, *Regina v. Langbridge* (b). The latter case was prior in point of time to the former, and was a decision of the Court of Criminal Appeal in England, upon a point reserved. The objection there was, that no offence was stated in the caption to the deposition; and the judgment of the Court is certainly, in its terms, an express authority upon the question

(a) 1 F. & F. 641.

(b) 1 Den. C. C. R. 448.

before us; the Chief Justice stating broadly that "there is no authority requiring any title, or, as it is called, caption, to the examination; and it is sufficient if it be described as the examination of the witness, and that the evidence refers to the charge on which the prisoner may be upon his trial." But, it is said that this authority should not guide us; first, because the case is not stated to have been argued; and, next, because it does not appear, that the attention of the Judges was called to the provisions of the English Act, 11 & 12 Vic., c. 42; and the decision may have gone upon a consideration of the state of the law antecedent to, and irrespective of, that statute. Both observations have some force; but, on the other hand, it is to be remembered that the Chief Justice is said to have delivered a written judgment, after full consideration, and that there is difficulty in presuming such Judges as Mr. Baron Rolfe and Mr. Justice Cresswell to have been ignorant of a piece of legislation, of such grave importance, which had existed for many months before their ruling was pronounced. At the lowest, however, this decision must be taken to determine that, before the statute, such a deposition as we have to consider would have been properly admissible in evidence. The case of *Regina v. Newton* is certainly an authority for the rejection of the document; but that was merely the decision of Mr. Justice Hill—no doubt a very good and able Judge—on circuit, with the concurrence of his colleague Mr. Baron Watson. The point was raised by himself; there was no discussion of it; and no reference was made to the ruling of the Court of Criminal Appeal, although *Regina v. Langbridge* had been decided ten years before. I do not think that we can be guided by the opinion of a Judge, given under such circumstances, however much it may be entitled to respect. It seems to me that, on the whole, the weight of authority is with the Crown.

The view of the Court in *Regina v. Langbridge* appears to have been adopted by the profession in England. Mr. Taylor says (*Evidence* 1, s. 455):—"With respect to the mode of entitling the depositions, one caption at the head of the whole will suffice, if,

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T. T. 1865. "indeed, it be necessary to have a caption at all; and no objection
Crim. Appeal. "can be sustained on the ground that the title does not state, with
THE QUEEN "sufficient precision, the charge against the accused."
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Assuming, however, that the question is still open, it appears to me that the effect of the statute is this:—if a person is *charged* with an indictable offence, the Justice may take a deposition against him. The charge of the offence is the condition of the action of the Justice; but that charge may be made in a warrant, issued upon an information, or in a summons to appear, or in a charge sheet such as is found in the metropolitan police offices, or in the verbal statement of a police officer, or of the prosecutor himself. If the charge is so made, the right of the Magistrate to take the deposition is established, and the statute does not make any formal statement of it to the accused necessary for that purpose. The Magistrate is then, having received the charge, authorised to take the depositions on oath and in writing of those who shall know the facts of the case, in the form which the schedule prescribes. That form (A b) contains a recital, that the deposition has been taken in the presence of the accused, who stands charged with a particular offence, and then provides for the statement of the witness as to the facts within his knowledge. There is no direction that the recital of the charge shall be read to the prisoner, as there is no provision that the charge made to the Magistrate shall be personally communicated to him; and, so far as I can see, consistently with the section and the schedule, the deposition might be taken without any specific communication of the charge, or any reading of the recital of it.

What is really material to the accused in the provisions of the Act is this—that the deposition shall be taken in his "presence and hearing;" and that he or his Counsel shall have an opportunity of cross-examining the witness. If it shall have been so taken, and if he shall have had such opportunity, the deposition may be read after the death of the witness; and both these conditions seem to have been fully supplied in this case. The deposition—every word of it—was taken in the presence and hearing of Thomas Galvin. He had the fullest opportunity of cross-examination. It was for the Judge who tried the case to say, whether he had or had

not such opportunity. If he had not; if he was prevented from understanding the complaint against him; if he had not such knowledge of it as would enable him to enjoy the fullest opportunity of cross-examination; if, either by the contrivance of the prosecutor or by his neglect, the accused person was deprived of fair and ample means of testing the evidence against him, the Judge at the trial was bound to reject the deposition. But, the condition of its admissibility appears to me to have been such fair and full facility of hearing the examination and making the cross-examination, and not any formal preferment of the charge to the prisoner, which the statute does not direct; or any formal recital of it in the heading of the deposition, of which that statute gives him no right to be cognizant. The question as to the statement of the complaint to the prisoner is not that which we have substantially to consider upon the reservation of the learned Judge; but it is material, as introductory and ancillary to the consideration of that question, which exclusively regards the admissibility of the information. And, if I be right in thinking that the terms of the 14th section of the Act may well be satisfied if the charge be made to the Magistrate upon a warrant or a summons, or a police sheet, or by verbal statement, though he may not personally repeat it to the accused, I see no reason for believing that the imperfect recital, or the want of the recital of it, in the heading of the deposition, should make it inadmissible.

According to the 36th section of the 14 & 15 Vic., c. 93, the forms in the schedule, or "forms to the like effect," are to be employed in proceedings under it; but no departure from any of them, or omission of any of the particulars which they require, shall vitiate or make void the proceeding or matter to which they may relate, if the form used be otherwise sufficient in substance and effect. In my view of the statute, the departure and omission in this deposition or information does not vitiate it or make it void for the purposes of evidence. The deposition which seems to me (having regard to the terms of the first clause of the 14th section, and the note to the form A b) to begin after the heading or caption, which is not a part of it, was properly taken and is legally unimpeachable. I

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T. T. 1865. do not say that the form should not be followed; nor is it within my
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 v. prisoner himself,—as he must do, for obvious reasons, when the
 GALVIN. accused is called on to make a statement in reply, according to
 the form *A c* in the schedule,—and, having preferred it, to make
 it part of the deposition. I merely say that the statute does not
 appear to me to have created this necessity; and I can imagine
 serious practical difficulty if it did. For, in that case, either the
 allegation of the cause of complaint to be made before the exami-
 nation of the witness must be required to be strictly accurate,
 or it need not be so. If not, and if, in Mr. Taylor's words, “no
 “objection can be sustained on the ground that the title does not
 “state, with sufficient precision, the charge against the accused,”
 its statements may be delusive, and rather injurious than beneficial,
 in directing his course of cross-examination. If, on the other hand,
 the true cause of complaint must be set forth, with precision, this
 may be impossible in a multitude of instances. Reluctant witnesses
 will sometimes make their statements only on the coercion of an oath;
 and, until they have been examined, the nature of the complaint they
 can sustain is not accurately known. How is that complaint to be
 described, before the examination? Or if, as may often happen,
 the charge on which a man is arrested turns out, upon the pre-
 liminary inquiry, to be different from that on which the evidence
 shows he must be tried—*e. g.*, if the witness on a complaint for
 a common assault proves a case of rape, or on a complaint for
 larceny proves an obtaining of goods under false pretences,—is the
 Justice to recommence the examination, and re-entitle the depo-
 sition, or is he to leave it in its condition of error, which has
 misrepresented the fact, and may have misled the prisoner? These
 seem to me some of the practical considerations which might make
 imperative legislation, in the sense of the argument against the
 conviction, difficult. But it is enough for me to say that, whilst, in
 the particular case before us, there was manifestly no prejudice to
 the prisoner, who had the charge against him stated by his accuser
 in the most accurate and unmistakeable terms, I am of opinion

that everything which the statute makes essential was done by the Magistrate, and that the deposition was properly admitted by the learned Judge.

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DEASY, B.

In this case the question is, whether the information of Michael Hickie was rightly received in evidence against the prisoner. It was taken before a Magistrate, and it was tendered and received in evidence, under the 14th section of the 14 & 15 *Vic.*, c. 93; and the question is, whether the provisions of that section have been sufficiently complied with to warrant the Judge in receiving it in evidence?—[Reads section.]—The form in the schedule B, which the section refers to, and which schedule is, by the 48th section, made part of the Act, is in these terms:—"The depositions of D G, of X Y, "taken in the presence and hearing of C D, who stands charged "with [cause of complaint, with name and place]." The deposition in question varies from that form, in two respects, it does not state that it was taken in the presence and hearing of the prisoner; and it does not state the charge or cause of complaint against the accused. The first of these omissions is supplied by the parol evidence of the clerk, which shows that it was taken in the presence and hearing of the accused; but that parol evidence fails to supply the second omission. Indeed the evidence of the clerk shows that the charge against him was not stated to the accused, but that he was left to infer it from the evidence of the witness. The objection grounded on the latter objection was that argued before us; and I am of opinion that it is well founded. Looking to the Act itself, independently of any authority, I have no doubt that the Legislature intended that the deposition of the deceased witness, which was to be read against him, should contain a statement of the charge respecting which the witness who made it was examined, for the double purpose of informing the prisoner of the object with which the evidence was given; and of informing the Court before which the trial might take place of the nature of the charge with reference to which the evidence was given. The first was of great importance in securing to the prisoner the full benefit of that

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opportunity of cross-examination which the Legislature intended to secure for him. For it is obvious that, in many cases which might be suggested, a person accused might be utterly unable to cross-examine a witness produced against him with effect, or at all, unless he was apprised, at least in general terms, of what was the nature of the charge against him, which that witness's testimony was intended to establish. It is sufficient to mention a case in which a serious criminal charge is sought to be established by a long chain of circumstantial evidence, where the statement of each particular witness would be in itself apparently insignificant, but when taken in connection with the other evidence might have a most material bearing on the guilt of the accused. It is also of importance that the Court, before which the trial takes place, should be informed, by the contents, of the occasion on which, and the purpose for which, the evidence was taken, in order, by comparison with the charge in the indictment, to enable the Judge to determine whether the accused had, with reference to the latter charge, the full benefit of cross-examination which the statute intended he should have. It appears to me that these two objects were intended to be secured by the provision that the deposition should be taken in the form in the schedule; and it is the deposition taken with these safeguards, and that alone, that the Legislature has made admissible against the accused. That is, I think, made clear by reference to the next paragraph in the same section, which deals with the statement of the accused. There the provision is in the same words. The Justice shall take down in writing the statement (A c) of such person—that is, of the person accused. And on looking to the form A c in the schedule, it runs thus:—"A charge having been made before the undersigned Justice, that [cause of complaint, with time and place], and the said charge having been read to the said C D," &c. It is plain that the Legislature intended by this form that the statement of the accused should be preceded by a statement of the charge with reference to which it was made: and that strengthens the argument that the Legislature, when using similar words with reference to the deposition of witnesses, had a similar intention—viz., that

that deposition should also be preceded by a statement of the charge with reference to which it was made. Independently of authority, I should be of opinion, on the construction of the Act, that the deposition should be preceded by a statement of the charge with reference to which it was made, in order to render it admissible against the accused.

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It is said, however, that it has been decided by the Court of Criminal Appeal in England, that there is no necessity for any such statement; and the case of *The Queen v. Langbridge* (a) was relied on to establish that proposition. I do not consider that it decided any such thing. There the deposition stated that it was taken "in the presence and hearing of the accused, who is now charged before me this day for obtaining money and valuable security for money." The objection was, that it did not state that she was charged with obtaining illegally; but it necessarily implied that; otherwise there could be no charge and no examination. The Court, in that case, held that the deposition was properly received; and Wilde, C. J., in giving his judgment, says:—"The title of the deposition states the occasion of its being made, and the matter to which it refers." It is true he goes on to add, "and there is no authority requiring any title, or, as it is called, caption, to the examination; and it is sufficient if it be described as the examination of the witness, and that the evidence referred to the charge upon which the prisoner may be upon his trial." But, taking the whole passage together, and with reference to the facts of the case, I understand it as merely a decision that, in that particular case the deposition had sufficiently stated in the title of it the occasion upon which it was taken, and the matter to which it referred, in conformity with the Act of Parliament. I do not consider it as a decision that a deposition which omits all mention of the occasion on which it was taken, or the charge to which it refers, like that now in question, is notwithstanding admissible in evidence. Neither has it been so considered in England. In the case of *The Queen v. Newton* (b),

(a) 1 Den. C. C. 448; S. C., 2 Car. and Kir. 973.

(b) 1 F. & F. 641.

T. T. 1865. where a woman, who had been grossly outraged, made a deposition
Crim. Appeal. before a Magistrate, in the presence of the prisoners, but there
THE QUEEN was no statement in it of the charge against the accused, Hill, J.,
v. after consulting with Watson, B., refused to admit it to be read,
GALVIN. and the prisoners were consequently acquitted. "Without the
caption," he says, "it is not shown on what charge the evidence
was given." On his return to Court, after consulting with Wat-
son, B., he said—"My Brother Watson and I are of opinion that
this document is not admissible in evidence. The statute 11 & 12
Vic., c. 42, s. 17, authorises taking depositions in a particular
way; and unless it appears upon the caption that the prisoners
are charged with an indictable offence, you cannot eke that out
by parol evidence. It would be opening a very dangerous door to
false accusations if parol evidence of the nature of the charge on
which the evidence against a prisoner in the depositions was taken
could be supplied." That case is open to the observation which has
been made in the present, that the nature of the evidence showed
plainly what was the nature of the charge against the prisoners,
and that they could not have been prejudiced in the exercise of
their right of cross-examination by the omission of the formal
statement of it in the caption; yet those two Judges held that
the omission of that formal statement was fatal, and that it could
not be supplied by parol evidence. That is, they held that the
deposition should show that the accused was apprised, otherwise
than through the evidence, of the nature of the charge upon which
that evidence was given.

HUGHES, B.

I think this deposition was properly admitted in evidence. The
Court must be satisfied, first, that the prisoner was present; secondly,
that he understood the nature of the charge; thirdly, that he
had an opportunity of cross-examining the witness. The 14 & 15
Vic., c. 93, s. 14, then says that if those things are proved "it shall
"be lawful to read such deposition as evidence on the trial, without
"further proof thereof, unless it shall be proved that the same
"was not signed by the Justice purporting to have signed the

"same." This section does not require that the charge shall be stated to the prisoner, it only requires that the deposition shall be read to the prisoner. The language of the statute as to the charge is different when it comes to the examination of the prisoner himself. In that case it is expressly provided that the charge shall be read. When the Court is satisfied by proper evidence that those matters required by the 14th section have been done, then the deposition is made evidence.

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In this case it further appears that the nature of the charge was understood, from the pertinent cross-examination of the witness by the other prisoners.

FITZGERALD, B.

The only question for our decision is, whether a certain paper writing, a copy of which is set forth in the case before us, was properly received in evidence at the trial of Thomas Galvin the younger.

The paper writing in question appears to be entitled in a cause or matter of "The Queen v. Thomas Galvin sen., Thomas Galvin jun. and Michael Farrell." It purports to be the "Information of John Hickie." It purports to be a statement on oath by John Hickie of certain facts; it purports to have been signed by John Hickie; it purports to have been sworn at the city of Limerick, on the 23rd of September 1864, before J. O'Shaughnessy, a Justice of the Peace; and it has a *jurat* purporting to be signed by him. The statement of facts which it contains is this:—"On Tuesday the 20th day of September inst., I had an argument with Thomas Galvin jun., at the racecourse. He was after striking James M'Inerney, and I struck him with a stick. I returned to Limerick at about seven o'clock in the same evening, when I saw *the prisoner* Thomas Galvin sen. and Michael Farrell, in contact with James M'Inerney. I went between them, to separate them. I made a blow at *the prisoner* Thomas Galvin sen.; I don't know whether I hit him or not. *The prisoner* Michael Farrell then caught me, and held me, when *the prisoner now present, Thomas Galvin junior*, stabbed me with some sharp

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"instrument under the arm, then in the belly, at both sides. I
 "put down my hand, and felt the blood coming, and immediately
 "went to the hospital."

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At the trial of Thomas Galvin sen., Thomas Galvin jun., and Michael Farrell, for the manslaughter of John Hickie, which took place at the Assizes for the city of Limerick next after September 1864, it was proved—that James O'Shaughnessy, whose name appears to be signed to the paper in question, was a Justice of the Peace for the city of Limerick. That, on the evening of the 23rd of September, Mr. O'Shaughnessy, in company with one Beauchamp, a clerk of Petty Sessions, and the three prisoners on trial, went to a room in Barrington's Hospital, in the city of Limerick, and up to a bed there, where John Hickie was then lying in a bad state of health, and very ill. That Hickie then made oath, before the Magistrate, that the evidence which he should give, *on the charge which he had against the prisoners*, would be the truth, the whole truth, and nothing but the truth; but no mention was then, or at any other time while the prisoners were present, made of what the charge was. That Hickie was then asked certain questions by the clerk. That his answers were truly taken, and (as I understand the evidence) on the paper in question; and each of the answers was read over *to him* as it was taken down. That, when all the answers were taken down, the whole was again read over to Hickie. That all this was done in the presence and hearing of the three prisoners. That the three prisoners were then told by the clerk that they were at liberty to cross-examine Hickie, and to ask him any questions. That two of the prisoners, that is to say, Thomas Galvin sen. and Michael Farrell, did put questions to Hickie; but it does not appear that Thomas Galvin jun. did ask any questions. That the answers of Hickie to the questions of the two prisoners were truly taken down on the same paper, and were then read over *to Hickie* in the presence and hearing of the three prisoners. That the whole paper was then again read over *to Hickie* in the presence and hearing of the prisoners. That the paper was then signed by Hickie, and finally by the Magistrate, who was present, and close to the clerk during the whole time.

It was further proved that one head constable O'Connor was, as well as the three prisoners, present during the whole time "the information" was being written; and it seems the fair result of the evidence that the three prisoners were in custody during the whole time.

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Further than I have mentioned, the paper does not purport to state what the charge against the prisoners, or any of them, was; nor was it in fact on that occasion otherwise stated to them, or any of them, what the charge against them was.

It was further proved that Hickie died on the next day; and I presume it is to be taken, though this is not stated, that he died from the effect of the wounds which he represented himself to have received on the 20th of September. From the fact of the three prisoners being in custody—from the title (though incorrect in form) of the paper—and from the form of the oath administered to Hickie, it would appear that some charge or complaint had been antecedently made by Hickie against the three prisoners. In fact it was proved by head constable O'Connor that, on the night of the alleged stabbing (the 20th of September), he saw Hickie at Barrington's Hospital, and that Hickie, who was then collected, and able to answer his questions, told him that it was Thomas Galvin *senior* (the father of Thomas Galvin *junior*) who stabbed him, and that Thomas Galvin *junior* and Michael Farrell were aiding and assisting. Whether or not, it was on this charge or complaint that the prisoners were taken into custody; and whether they had or had not been apprised that this was the charge against them does not appear. But it does appear, as already stated, that no mention was made of what the charge against the prisoners was on the occasion of "the information" being taken, further than as it may be gathered from the facts stated by Hickie—taken down on the paper, and so read over, as already mentioned. "The information" was read over in parts, and in the whole, to Hickie, but not to the prisoners; though it was so read to Hickie in their presence and hearing, and they were told that they were at liberty to cross-examine. Other evidence, not particularly stated, was given at the trial. In the result, the learned Judge directed the acquittal of

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Thomas Galvin sen.; and he states that he considered it questionable, on the entire evidence, whether the prisoner Farrell had in any way aided and assisted at the stabbing of the deceased Hickie. The jury, on the charge against Farrell and Thomas Galvin jun. being left to them, acquitted Farrell, and found Thomas Galvin jun. guilty of the homicide. The question on the whole is, whether the paper purporting to be "the information" of John Hickie was rightly allowed to go to the jury as evidence against Thomas Galvin jun.?

The first obligation imposed by statute in this country on Justices of the Peace, of taking the informations in writing of persons knowing the facts and circumstances of a crime charged before them, was by the 10 *Car.* 1, sess. 2, c. 18, ss. 3 and 4, corresponding with the provisions of two English statutes passed in the reign of *Philip & Mary*. I say by statute, because Lord Mansfield, in *Fearshire's case* (a), seems to have been of opinion that there was a common law obligation to the same effect. The statute of *Charles* applied to charges of felony only, and was repealed by the 9 *G.* 4, c. 53. Provisions, however, of the same kind were enacted by the 9 *G.* 4, c. 54, ss. 2 and 3, corresponding with the English Act of 7 *G.* 4, c. 64, ss. 3 and 4; and these provisions applied to cases of misdemeanour as well as felony. Neither the Act of *Charles* nor that of *G.* 4 contained any provisions making the depositions evidence in the event of the death or other unavoidable absence of the deponent; though a somewhat peculiar provision for making such depositions evidence, in a particular class of cases, was made in Ireland, by the 50 *G.* 3, c. 102, s. 5. However, on the principles of the Common Law, depositions taken conformably with the provisions of the statutes of *Charles* and *G.* 4, were in practice admitted in evidence, in the event of the death or unavoidable absence of the deponents. But then, as in every other like case, in order to their admission, strict proof was required, not only of the death or unavoidable absence of the deponent, but also, first, *that* the depositions had been taken on oath; secondly, *that* they had been taken in a judicial proceeding; and, thirdly, *that* the person

(a) 1 Leach, 202.

charged had had an opportunity of cross-examination. The provisions of the 9 *G.* 4, c. 54, relating to these depositions, were repealed by the 12 & 13 *Vic.*, c. 69, which very nearly literally corresponds with the 11 & 12 *Vic.*, c. 42, an Act still in force in England. The Act of 12 & 13 *Vic.*, c. 69, was repealed by the 14 & 15 *Vic.*, c. 93; but owing to the operation of Lord Brougham's Act (13 *Vic.*, c. 20), without reviving the repealed provisions of the 9 *G.* 4. The result is, that the Statute Law applying to the present case is to be found wholly in the Act of 14 & 15 *Vic.*, c. 93. By the 14th section of that Act it is enacted that:—"The manner in which the evidence shall be taken, in proceedings for indictable offences shall be subject to the following provisions—in every case, *where any person shall appear or be brought before any Justice or Justices, charged with an indictable crime or offence*, such Justice or Justices, before committing such person for trial, or admitting him to bail, shall, in the presence of such person, *who shall be at liberty to put questions to any witness produced against him*, take the depositions (A b) *on oath*, and in writing, of those who shall know the facts of the case; and such depositions shall be read over to, and signed respectively by, the witnesses who shall have been so examined; and shall also be signed by the Justice, or one of the Justices who shall take the same; and if, upon the trial of the person so accused, *it shall be proved*, by the oath of any credible witness, *that any person whose deposition shall have been so taken is dead*, and that such deposition was taken in the presence and hearing of the person accused, *and that he or his Counsel or attorney had an opportunity of cross-examining such witness*, it shall be lawful to read such deposition as evidence on the trial, *without further proof thereof*, unless it shall be proved that the same was not signed by the Justice purporting to have signed *the same*."

It will be observed that, by the direction of the statute, the deposition to which it relates is to be taken, first, on oath; secondly, in a judicial proceeding—that is to say, when a person is before a Justice charged with an indictable offence; and, thirdly, in the presence of such person, who is to have an opportunity of cross-examination.

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But, in the event of the death of the witness being proved at the trial of the accused, then, in order to the admissibility in evidence of the depositions, one only of these three matters need be proved; though before the statute it would have been essential to prove all three, in order to the admissibility of depositions taken under the previous Acts. A form, however, is referred to in the enactment; and according to that form (which is in a schedule to the Act), the deposition purports to have been taken, first, on oath, and, secondly, in a judicial proceeding, in the presence of a person charged with an indictable offence; and purports also to have the signature of a Justice of the Peace attesting the whole. The 36th section of the Act provides that the several forms in the schedule to the Act, *or forms to the like effect*, shall be the proper forms to be used; but no departure from any of the said "forms, or omission of "any of the particulars required thereby, or use of any other words "than those indicated in such forms, shall vitiate or make void the "proceeding or matter to which the same shall relate, *if the form "used be otherwise sufficient in substance and effect*; and the words "used clearly express the intention of the person who shall use the "same." Having regard to the state of the law when this Act was passed, it appears reasonably clear to me that no form can be sufficient in substance and effect, so as to be admissible in evidence, on proof only of the death of the deponent, and that the accused was present, and had an opportunity of cross-examination, which form does not purport to have been taken, first, on oath, and, secondly, in a judicial proceeding; or on the occasion of the accused being before a Justice, charged with an indictable offence; and which does not purport to have the signature of the Justice attesting those two facts.

I cannot even conjecture any more reasonable mode of ascertaining what is of the substance of the deposition required by the statute, than by looking to the previous law for what were the essentials to be proved in the like case, which are still required by the directory provisions of the statute, though the attestation of the signature of the Justice is substituted for the strict proof antecedently required.

As the form of deposition used in the present case does not appear to me to show that it was taken in a judicial proceeding, or, that the accused was before the Justice charged with an indictable offence, it appears to me insufficient in substance; and, therefore, not admissible under the statute—that is, at least on the proof only of the matter required by the statute to be proved. I acknowledge the inclination of my opinion to be that, in consequence, it was not admissible at all; and that conclusion appears to me most conformable with the decisions on the Act of *G. 4*, in which it was more than once laid down that depositions under that Act, to be admissible, must be conformable with the Act; and also with the case of *The Queen v. Newton (a)*, a decision on the English Act & 11 12 *Vic.*, c. 42. Nor does this conclusion appear to me irreconcilable with the case of *The Queen v. Langbridge (b)*, which, as a decision, appears only to establish that the nature of the charge on which the accused is before the Justice need not be shown with the particularity of an indictment, and not that its being shown may be wholly dispensed with. As, however, in the present case, there may be some ground for saying that some evidence was given that a charge of stabbing had been antecedently made, and that the accused were in custody on that charge before the Magistrate in Barrington's hospital; and it was also proved, that the deposition was taken on oath; I am unwilling, without necessity, to decide that extrinsic proof of the essentials at Common Law might not make the deposition admissible.

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It does, however, appear to me that one matter, essential both at Common Law and under the statute, was not sufficiently proved—that is to say, that the accused had an opportunity of cross-examining the witness. It seems to me necessary for that purpose to be shown that the accused was apprised (previously to his being called on to cross-examine) of the charge against him. I think that he ought to be so apprised, and otherwise than by the statement of facts made by the witness in his presence, and to which he may or may not have attended; or, if that state of facts is

(a) 1 F. & F. 641.

(b) 1 Den. 448.

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to be considered as a charge on oath or an information in its strict sense, it ought at least to be read over *to him as such*, before he can be legitimately called on to cross-examine. I think it is not to be assumed that the accused will attend to the witness in order to learn the charge against him; but that he is to be apprised of the charge in order that he may attend to the witness. In the present case, it not only does not appear that the prisoner was, on the occasion of the taking of the deposition in question, apprised of the charge against him, but it does appear that he was not so apprised, otherwise than by his being within hearing of the facts deposed to by the deceased, when stated by the deceased, and when read over *to the deceased witness*.

I do not wish my decision to rest on any other matter peculiar to this case; and on this ground think the deposition was inadmissible. In the way of illustration, however, of the importance of the accused being apprised of the nature of the charge against him, in substance and practically, I cannot but refer to the evidence of O'Connor. According to that evidence, the charge or complaint made by the deceased on the night when he was wounded was, that the person who actually stabbed him was Thomas Galvin *senior*. The Judge informs us, that the variance between this statement and the statement in the deposition was urged, as one might expect it would be, by the Counsel for the prisoner at the trial. No one can doubt its importance; but how much more important might it have been, if known to the prisoner, as a material for cross-examination of the witness while living. Either the prisoner did or did not know that the charge was originally made in that form: there is no evidence that he did; if he did not, he lost from not being apprised of the charge, as made an important element of cross-examination; if he did, from his attention not being called to the information *as a charge*, his noticing the variance depended wholly on his distinguishing between the words "*senior*" and "*junior*" as the evidence was given.

It is true that the charge or complaint, as originally made, might legally be described as a charge of stabbing against all the three prisoners as principals. But I do not allude to this circumstance

as, of itself, sufficient to make the deposition inadmissible, but as an illustration of the caution which ought to be observed, of not depriving the prisoner of the utmost knowledge of the nature of the charge against him, which the law requires—of not abridging his legal privilege in any respect.

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HAYES, J.

I think the deposition was properly received in evidence. I concur, therefore, with my Brothers O'HAGAN and HUGHES, and for the reasons they have given.

O'BRIEN, J.

I expressed at the trial that I entertained considerable doubts as to the admissibility of this deposition in evidence; but as the Crown Counsel stated, that without it they had no sufficient case against the prisoner, I adopted the course usual on such occasions, and allowed the document to be read to the jury, reserving for this Court the question of its admissibility. On further consideration, I am of opinion that the document was not legally receivable in evidence; and that, therefore the conviction should be quashed.

The objections taken by prisoner's Counsel, on the ground of Hickie not having been properly sworn, or the document read to the prisoner after it was signed, cannot, I think, be sustained; but prisoner's Counsel have relied on two other objections which, in my opinion, are well founded. The admissibility of the document has been rested by the Crown Counsel upon the 14th section of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vic., c. 93); and those objections are to the following effect:—First; that the document contains no caption or title (according to the form "A b" referred to in that section) stating what was the offence charged against the prisoner, and for which he was brought before the Magistrate. And showing upon what charge the evidence was given. And, second; that, even supposing parol evidence to be admissible for the purpose of supplying the omissions in the document itself, and of showing that before the examination of the

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witness, the prisoner was in fact apprised of the offence with which he was charged, yet, that in the present case it appears from the evidence that the offence charged against the prisoner was not stated to him, or in his presence, either before the commencement of the examination, or at all upon that occasion, save so far as he might have inferred it from the examination and evidence of the witness. This latter ground of objection has been so fully discussed by my Brother FITZGERALD, in his judgment, that it is unnecessary for me to do more than to adopt his reasons, and to express my concurrence in his opinion, that to render the deposition of a deceased witness admissible in evidence against the prisoner, it is necessary, not only that it should be taken in his presence, but also that before the examination commences he should be apprised of the charge made against him.

With respect to the other ground of objection, I shall make some further observations. In laying down rules as to the admissibility of evidence, such as that now in question, it is essential that due precaution should be taken to prevent the prisoner being unjustly prejudiced, either by the mistake of the Magistrate or by the wilful or unintentional misstatements or omissions of the witness. In several cases, before the passing of the Petty Sessions Act of 1851, doubts and difficulties of a technical character had been raised as to the legal reception of such evidence. And I think it clear, that the several provisions respecting it which are contained in that Act were inserted for the purpose of removing such technical difficulties, and, at the same time, affording due protection to the prisoner.—[Reads 14th section, first paragraph.]—That expressly refers to the form “A b” in the schedule, as the form in which the deposition of the witness should be taken; and if that form be adopted, many of the technical difficulties which formerly existed as to the reception of such evidence are removed by the subsequent provision in the first paragraph, that the deposition, when signed by the witness and the Magistrate, should be read at trial, without further proof than that of showing that the witness was dead, and that the deposition was taken in the presence and hearing of the prisoner; and that he, or his Counsel or

attorney, had the opportunity of cross-examining the witness. According to the form "A b," the deposition should contain a statement of its being taken in the presence and hearing of the prisoner, and of the offence with which he "*stands charged*;" and this manifestly imports that the charge should have been stated to the prisoner. In my opinion these several provisions clearly show what was the intention of the Legislature as to the conditions upon which such evidence should be received; and with ordinary intelligence and care on the part of the Magistrate, there would be no difficulty in complying with them. The objection in the present case arises from the evident mistake of the Magistrate in adopting the form "A a" in the schedule (that for an ordinary information), instead of the form "A b." It has been contended by the Crown Counsel that these provisions of the statute are directory only, and not mandatory. And one ground relied on by them is, that there is no express direction in the enacting part of the statute that the charge should be stated in the presence and hearing of the prisoner. In answer to this it may be said that, considering the enacting part of the statute in connection with the form "A b," to which it refers, it is clear that the Legislature assumed that the charge should have been so stated. A similar observation would apply to the second paragraph of the section, which provides for the Magistrate taking down the statement of the prisoner, and refers to the form "A c" in the schedule; that form also imports that the nature of the charge should have been stated to the prisoner, and read to him, before he made his statement; but there is no express direction in the enacting part of the statute that it should be done; and yet it would be difficult to contend that the Legislature contemplated that the statement of the prisoner should be made without his having been apprised of the charge.

In addition to the argument upon the statute itself, it appears to me that the case of *The Queen v. Newton* (a) is an express authority against the admissibility of the deposition in question. In that case the deposition of a deceased party was made before a Magis-

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trate (Mr. Jeffcott), in the presence of the prisoners, but did not contain any caption, or any statement of the charge against the prisoners having been stated to them. An objection was taken by prisoner's Counsel to the reception of this document in evidence, upon the ground that, from the state of health of the deceased at the time, there was no sufficient opportunity of cross-examining her; but Mr. Justice Hill himself took another objection, namely, that it had no caption; and he stated that, without such caption, it was not shown upon what charge the evidence was given. The prosecuting Counsel (Mr. Foster) contended that the want of a caption was supplied by the parol evidence in the case, which showed that in fact the prisoners had been taken on the particular charge in question, and had been brought before the Magistrate on that charge; that the statement of the deceased was taken down in writing, and signed by the deceased in presence of the prisoners, and that they had full opportunity of cross-examining her. Mr. Justice Hill, however, after conference with Baron Watson, stated their joint opinion to be, that the deposition was not admissible in evidence. He referred to the English statute (11 & 12 Vic, c. 42, s. 17, corresponding to the Irish statute now before us), as authorising the taking of depositions in a particular way; and then stated:—"Unless it appears upon the caption that the prisoners are charged with an indictable offence, you cannot eke out that by parol evidence. It would be opening a very dangerous door to false accusations, if parol evidence of what was the nature of the charge on which the evidence against the prisoner was given in the deposition could be supplied." With reference to this case, it has indeed been suggested that the report of it is inaccurate, and that the real objection to the deposition was, that it had not been signed by Mr. Jeffcott, the Magistrate before whom it was made. But, upon the report itself, and considering that Mr. Foster, one of the reporters, was himself the prosecuting Counsel, there appears no ground whatever for such a suggestion, or for supposing that any such ground of objection existed. It has been also since contended that this decision was at variance with the previous case of

The Queen v. Langbridge (a), decided by the Court of Criminal Appeal. But the facts of that case are materially different, both from those in the present case, and from those in *The Queen v. Newton*. The prisoner was tried for unlawfully obtaining money, &c. The deposition, which was read in evidence, had a caption or title, which stated that it was taken in the presence and hearing of the prisoner, "*who is now charged before me this day for obtaining money,*" &c. The only objection relied on against the admissibility of the deposition was, that the caption, in stating the offence, did not use the word "*illegally*" or "*unlawfully,*" with reference to the taking of the money. The Court unanimously held that the deposition was properly received in evidence; Chief Justice Wilde observing, in delivering judgment, that the title of the deposition stated the occasion of its being taken, and the matter to which it referred, and that it appeared on the reserved case that the prisoner was informed by the Magistrate of the exact charge preferred against her. It is true that Chief Justice Wilde, in his judgment, also stated that there was no authority for requiring any title or caption to the deposition; but this opinion may be regarded as extra-judicial; it was not called for by the facts of the case: the attention of the Court was not directed to the English statute, already referred to (11 & 12 Vic., c. 42, s. 17), which had been passed the preceding year, to regulate the taking of such depositions; and it does not appear that the question of the necessity of there being some caption or title to the depositions was raised in the argument before the Court. In several cases which have occurred since the English Act, objections have been taken to the admissibility of such depositions, on the ground that the title or caption did not correctly state the offence with which the prisoner was charged, or stated a different offence from that for which he was tried; but it does not appear to have been held, in any of those cases, that the deposition would have been admissible if it contained no statement of the offence, or no caption or title whatever.

The Crown Counsel have also relied on the 36th section of the,

(a) 1 Den. C. C. 448.

(b) See, amongst others, *The Queen v. Clark* (2 F. & F. 2).

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T. T. 1865. Irish Act in question, which declares that no departure from the forms in the schedule should vitiate the matter to which they relate ;
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THE QUEEN but the section adds to this declaration the proviso, "*if the form*
v. *used be otherwise sufficient in substance and effect.*" And if, for
GALVIN. the reasons I have already stated, it is requisite, under the other provisions of the statute, that the deposition should contain a statement in the caption or title of the offence with which the prisoner was charged, it is clear that the objection now before us is one of substance, and is therefore not removed by this 36th section. The proviso would rather show the intention of the Legislature, that in the forms used there should be a substantial compliance with the requirements of the statute.

On these several grounds, I am of opinion that the deposition was not legally admissible in evidence, and that, accordingly, the conviction should be reversed.

CHRISTIAN, J., concurred with O'HAGAN, J., that the evidence was properly received.

FIGOT, C. B.

In my opinion this deposition ought not to have been received in evidence. I concur, not only in the expressed opinion of my Brother FITZGERALD, but also in that to which he inclines. In my opinion, not only ought the prisoner to be informed of what the charge against him is, but that charge ought to appear upon the face of the deposition.

The term "caption" is rather loosely used in reference to a document of this nature. It is generally employed to denote that part of the record in a Criminal Court, when formally made up, which precedes the statement of the finding of the indictment, and which shows before what tribunal the proceeding was pending. In documents such as that with which we are dealing, it is used to denote that preliminary statement which shows before what tribunal, and in what matter, the information or deposition is taken. In that sense I shall use it. And it appears to me that it ought to show, for the purpose of making the deposition admissible in evidence—that which the statute 14 & 15 Vic., c. 93, requires,

in order to confer the jurisdiction of taking the deposition, namely, that a charge of an indictable offence was made before the person who takes the deposition, and that such person was a Justice of the Peace. The deposition ought also to show that the Justice (or one of the Justices) before whom it is taken is the Justice by whom it is signed. No person has jurisdiction to take the deposition who is not a Justice of the Peace; and no Justice of the Peace has that jurisdiction unless the accused is charged with "an indictable crime or offence." The words of section 14, clause 1, are:—"In every case where any person shall appear or be brought before any Justice or Justices, charged with any indictable crime or offence, such Justice or Justices, before committing such person" (that is, a person so charged before a Justice or Justices) "or admitting him to bail, shall, in the presence of such person, who shall be at liberty to put questions to any witness produced against him, take the depositions (A b) on oath, and in writing, of those who shall know the facts of the case," &c. Connecting that enactment with the schedule of forms, I think the Legislature have plainly manifested their intention, that the depositions taken before the Magistrate shall state enough clearly to show what the charge is, and that it is one upon which, if true, an indictment would be sustainable. In the schedule (a portion of the Act which is most important for securing legality, as well as uniformity, in the administration of justice before the local tribunal), not only is there nothing to countenance the view contended for on the part of the Crown, but the forms are directly opposed to it. The form given for a recognizance (C) commences "whereas;" the marginal note says, "*state cause of complaint*;" and the obligation, according to the margin, is to surrender himself, and "to plead to any indictment *found for said offence*, and to take his trial *for the same*." So, with respect to the examination of the party accused, the form indicates that the document shall show what the charge is—"a charge having been made against C D, before the undersigned Justice, that;" and the marginal note states, as the matter to be there inserted, "*state cause of complaint, with time and place*." In the 11th section, the modes of procedure are prescribed for enforcing

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 THE QUEEN Justice "to answer to the complaint made in the information;"
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 GALVIN. thus imposing on the Magistrate the obligation to see that the
 charge has been specified. I refer to these portions of the statute
 to show that a specification of the charge was, throughout the
 provisions relating to procedure, contemplated by the Legislature.
 And this appears to me to have been necessary, in order that the
 Legislature should be consistent with itself. I cannot reconcile
 the intention of the Legislature, which they have plainly expressed,
 that the jurisdiction of the Magistrate shall be exercised only where
 the prisoner stands charged with an indictable offence, with the
 intention that there shall be no necessity for the Justice to state
 that charge in the documents which are framed under his authority
 and inspection, and for which the Legislature has itself supplied him
 with forms. The terms of the 14th section, clause 1, seem to me to
 be clear and precise, in showing the purpose of the Legislature. It
 says, the Justice shall, "in the presence of such person," "take the
 depositions." What person? The person "who shall appear or be
 "brought before any Justice or Justices, charged with any indictable
 "crime or offence." Reading these words—giving them the mean-
 ing which a reader of ordinary understanding would give them, and
 coupling them with the other parts of the statute, I think the Legis-
 lature intended, not only that the prisoner, at the time of the deposi-
 tion, should stand charged before the Magistrate with an indictable
 offence, but also that, at the time of the deposition, he should be
 apprised of the charge, and that the charge should be specified in
 writing, in the document which constitutes the deposition of the
 witness. There are two forms provided for statements on oath before
 a Magistrate. One is of an information to ground proceedings
 for bringing the accused before the Magistrate. The other is of
 a deposition taken in the presence of the accused. As to the first,
 there is nothing said of the party accused having been charged
 with an offence: because the information itself may contain the
 first intimation of the charge. As to the second, the title is—
 "The deposition of X Y, of M N, taken in the presence of C D,

who *stands charged* that." Why "stands charged," unless that means that he is there alleged, and alleged on the face of the deposition, to have been guilty of an indictable offence? Now what are the words that are used in the form of the examination of the accused? They seem to me to remove all ambiguity. "A charge having been made against C D, that;" and the form proceeds—"and the said charge *having been read* to the said C D." There is nothing in that preliminary, or "caption," part of the examination to indicate what the charge is, unless it is stated after the word "that." The marginal note states what is to follow—"Cause of complaint, with time and place." And the form shows that "the charge so made" is not merely to be explained or stated to the accused, but that it is to be "*read*" to him; and the form further shows (what indeed the 14th section had previously enacted), that the witnesses have been examined in his presence. The Legislature plainly desired, that the accused, before he should make a statement which might criminate himself, should be distinctly apprised of the charge in a form so recorded that there should be afterwards no ground for controversy as to the terms in which it was conveyed; and that it should stand so recorded in that "examination" which the marginal note to the form directs "to be signed by him if he will." If it be essential that the charge to which he makes, or declines to make, a statement of his own, shall appear upon the face of his "examination," it is surely also essential that the charge, as to which he cross-examines a witness, or declines to do so, shall appear upon the face of that deposition as to which he cross-examines, or abstains from cross-examining, and which, with or without cross-examination, may, after the death of the witness, be read against him on his trial. A distinct statement, so recorded, of the charge, may be as necessary for rendering intelligible the statements of a witness on cross-examination, as for rendering intelligible the statement of the accused.

The 36th section seems to me sufficient to remove all doubt as to what the Legislature intended, if doubt existed, upon the 14th section and the schedule of forms.—[Reads the 36th section, down to the words "who shall use the same."]—This section pro-

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vides that, while the forms supplied in the schedule shall be proper forms, yet forms to "the like effect" may be used. But it super-adds this qualification—viz., after providing, that "No departure from the said first mentioned forms or omissions of any of the particulars required thereby, or use of any other words than those indicated in such forms, shall vitiate and make void the proceeding or matter to which the same shall relate," it super-adds—"if the form used be otherwise sufficient in substance and effect." Now, in my judgment, the words "substance and effect" show that in each of the forms there is matter of substance which must be, in effect, comprised in any form that may be used. And when I find in each of several of these forms the same words used, indicating that it shall comprise a matter so important as the statement of the charge made against the accused, I feel constrained to hold that the statement of the charge is a necessary part of each form in which the schedule prescribes that such statement shall be contained; and consequently that it ought to be contained in the deposition of a witness. As to the authority of the case of *Regina v. Langbridge*, I desire to treat it with every deference. But the expressions of the Lord Chief Justice in the report of that case require careful examination. There, the objection was, only, that the title of the deposition had not, *with sufficient distinctness*, stated the charge; not, as here, that the deposition contained no statement of any charge against the accused. Two answers were given to the objection so made in *Regina v. Langbridge*; and either of those answers, if both were right, would have been sufficient. One was, that there was no authority requiring any caption. The other was, that from the nature of the Act charged it seemed impossible to maintain that the accused could misunderstand what was meant by the charge which *was* stated. And this latter view seems to have been sustained by other parts of the judgment. The observations of the Lord Chief Justice as to the absence of anything for holding that a caption was at all necessary, appears to have been made without his attention having been drawn to the 11 & 12 Vic., c. 42, which had been passed in the year preceding his judgment; and those observations were probably made in

reference to the law under the statute of 2 & 3 *Philip & Mary*, which did not, in terms, require any caption, or the statement, in a deposition, of any charge. The case in *Foster & Finlayson (Regina v. Newton)* appears to me to be clearly reported and well decided. It was the decision of a most able Judge, now, unhappily, withdrawn from the Bench, of which he was a distinguished ornament; a decision made by him after consultation with his colleague on circuit. The case is reported by a gentleman of the Bar, one of the reporters of the reports of *Foster & Finlayson*, who not only was himself engaged in the case, but was so engaged as Counsel for the Crown; the decision being in favour of the prisoner. So that we have not only the reported decision, but we have that decision reported by the Counsel against whom it was made. I therefore cannot treat the decision as one of light authority. In that case, Mr. Justice Hill referred to the statute 11 & 12 *Vic.*, c. 42, s. 17, which appears not to have been noticed in *Regina v. Langbridge*.

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The view taken by Mr. Justice Hill in *Regina v. Newton* appears to me to be in accordance with legal principles, as applied to written documents when used in evidence, and the best calculated to effectuate the object of the Legislature in applying the Act of Parliament with which we are dealing. If the opposite view should prevail, I see no reason why a deposition might not be received in evidence upon the mere proof of the signature of the Magistrate, with parol evidence that the prisoner was charged, by parol, with an indictable offence, and that the prisoner had an opportunity of cross-examining a witness, whose evidence, first given by parol, was afterwards taken down in writing and signed by the Magistrate, without containing any specification of the charge to which it applied: that is, that parol evidence might be received to supply proof of the jurisdiction to adopt a proceeding, where no jurisdiction appeared to exist upon the face of the proceeding itself. The ordinary principle is, that that which gives the jurisdiction should be shown, upon the face of the proceeding, the validity of which depends upon the jurisdiction. The judgment of Mr. Justice Hill was, in effect, that the jurisdiction, which only exists where a charge of an indictable offence is made against the accused, ought

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Crim. Appeal. evidence. Otherwise, upon a dispute as to the jurisdiction, it
 THE QUEEN must be made out by parol evidence. I think that decision is in
 v. accordance with the general principles of law. I think it is in
 GALVIN. accordance with the enactments of the corresponding statutes in
 both countries. I think it will best effectuate the intention of the
 Legislature in the statute with which we are now dealing, to
 hold that the responsibility shall be cast upon the Magistrate of
 seeing, that what the statute requires in order to confer a
 jurisdiction shall, by a substantial adherence to the forms which
 it has prescribed, be set forth upon the deposition which, as a
 Magistrate, he authenticates by his signature.

For these reasons, and the reasons which have been given by my
 Brothers who have expressed their opinion against the admissibility
 of this document, I am of opinion that it ought not to have been
 received, and that the conviction ought to be reversed.

MONAHAN, C. J.

In consequence of the very great difference of opinion which I
 was aware existed among the Members of the Court in this case,
 I have considered it with every attention in my power. Counsel
 for the Crown insist that the case is in fact concluded by authority,
 and that the case of *The Queen v. Langbridge* is an express deci-
 sion on the corresponding English statute. The question there was,
 whether the deposition of Mary Rowe was properly received in
 evidence. The case states that the prisoner was informed by the
 committing Magistrate that the charge against her was, that she had
 obtained the promissory note in question by false pretences. The
 caption of the deposition was, that she was charged with obtaining
 money, and other valuable security for money, from the said Mary
 Rowe. At the trial at Quarter Sessions it was objected, on behalf
 of the prisoner, that the deposition should not be received in evi-
 dence, inasmuch as the caption or statement of the charge was,
 merely receiving money, and not illegally, or by false pretences.
 It does not appear that the case was argued, or Counsel engaged,
 either at the trial or in the Court of Criminal Appeal. Wilde, C.J.,

delivered the judgment of the Court, page 449.—[Reads it.]—
 And Counsel for the Crown rely particularly on this passage:—"And there is no authority requiring any title, or, as
 "it is called, caption, to the examination; and it is sufficient
 "if it be described as the examination of the witness, and that
 "the evidence referred to the charge upon which the prisoner
 "may be upon his trial; and, as no objection was raised that
 "the deposition was defective in that respect, we think the deposition was properly read in evidence."

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It is quite true that when the prisoner in this case was tried, and of course when the case was before the Court of Criminal Appeal, the English statute 12 & 13 Vic., c. 42, corresponding with the Irish statute, 14 & 15 Vic., c. 93, had recently come into operation; and it is said we must assume that the attention of the Judges was directed to that statute, and that their decision was in fact founded on it, they holding, as several of the Members of this Court have in this case, that, though the form of deposition given in the schedule to the Act contains what has been called a caption, the absence of such caption or charge is altogether unimportant. I cannot acquiesce in this reasoning. I feel satisfied that, if the Court had considered the operation of the then recent statute, they would have said so, and would have stated the reasons for their opinion that the form prescribed by the statute might be departed from. I therefore entertain no doubt that *The Queen v. Langbridge* was decided, the Court overlooking altogether the then recent statute; and therefore I do not think it necessary to stop to inquire whether the caption in that case, having regard to the circumstances appearing in the report, might not properly have been held sufficient under the statute. No such observation can be made with respect to the case of *Regina v. Newton (a)*, which is an express decision that, without the caption under the statute, the deposition cannot be received in evidence, and that the want of it cannot be supplied by parol evidence. I do not mean to say that that, or any other Nisi Prius decision of a single Judge, however eminent, is binding on this Court, if we come to the conclusion that

(a) 1 F. & F. 641.

T. T. 1865. *Crim. Appeal.* it was not properly decided ; but, on the other hand, I confess it corroborates me in the opinion I have formed, that in the corresponding English statute a similar opinion has been formed by
 THE QUEEN v. GALVIN. so eminent a Judge as Mr. Justice Hill.

The real question therefore in the present case is, what is the true construction of the 14th section of the 14 & 15 *Vic.*, c. 93, having regard to the 36th section of the same statute? The 14th section enacts—[Reads it, see p. 456.]

Now the first question which arises is, what is the meaning of the phrase “charged with any indictable crime or offence?”
 * Now, having regard to the fact that this is the proceeding to be taken against the prisoner when the Magistrate is acting judicially, and considering whether the case against the accused is one that should be sent for trial, or the accused discharged therefrom, it occurs to me that the party is not charged under this section until he is informed, in presence of the Magistrate, of the particulars of the offence in relation to which evidence is about being taken against him, and that the statute implies that such charge is, in the first instance, communicated to the accused ; the accused being so charged before the Magistrate, the Magistrate is to take the depositions, on oath and in writing, of those who shall know the facts of the case, in the form in the schedule (A b). Now, in referring to the schedule, the first thing that appears is the marked difference between the forms of the information and the deposition. The form of the information does not purport to be sworn in the presence of the accused ; nor does it contain any caption or heading stating the nature of the charge. While, on the contrary, the deposition purports to be taken in the presence and hearing of the accused, who stands charged that—“stating cause of complaint, with time and place.” In the present case the form used is that of an information, so described, and does not purport to have been taken in the presence of the accused ; nor does it appear in the information that the accused was charged with any offence, further than is to be collected from the facts stated in the information. Now, the argument on the part of the Crown is, that all this is unimportant, and that what is called the information may be used

as a deposition, if in fact taken in the presence of the accused, and if he had an opportunity of cross-examining the party making it, though not informed of the nature of the charge against him, further than same was to be collected from the facts stated in the information, and which were stated in his presence. I am aware that, no matter how formal the deposition may be, it must be proved by independent evidence that same was taken in the presence or hearing of the accused party, and that he, or his Counsel or attorney, had an opportunity of cross-examining such witness. It is not part of the matter to be proved by parol evidence that the party was charged; though it is plain that, to render the evidence at all admissible, the party should have been so charged before the Magistrate. And I confess I concur in the opinion of Mr. Justice Hill, that it would be a very inconsistent inquiry to be determining, from parol evidence, what the charge against the accused was when before the Magistrate. Of course this difficulty would not occur in a simple case like the present, in which the information or deposition clearly contains the nature of the charge; but, it occurs to me, we are bound to decide the general proposition, and not particularly as to the nature of the charge in the present case. Another observation occurs to me, as to the forms in the schedule, namely, the statement of the accused, which commences in this way:—"A charge having been made against C D, before the undersigned Justice, that" (cause of complaint, with time and place); "and said charge having been read to the said C D, and the witnesses for the prosecution having been severally examined in his presence," &c. &c.

It occurs to me, that it is clearly to be collected from this form, that the first thing to be done before the Justice investigating the case is, the charge having been made, to read it to the accused, and then examine the witnesses in support of it. If this be so, the only direction given to have the charge in writing appears to me to be in the caption or heading of the deposition; and, therefore, on the whole, I have come to the conclusion that the deposition or depositions to be received in evidence at a trial shall contain a caption or some statement of the charge made against

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T. T. 1865. the accused, before the Magistrate, at the time of taking the
Crim. Appeal. evidence against him. And I do not think that the omission
THE QUEEN of such a statement is remedied by the provisions of the 36th
v. section, which enacts that no omissions of any of the particulars
GALVIN. required by the forms in the schedule, or use of any other words
shall vitiate or make void the proceedings or matter to which
same shall relate, if the form used be otherwise sufficient in
substance and effect; as I do not think the form used, being
that of an information as distinguished from a deposition, is suf-
ficient in substance and effect, as it appears to me a matter of
substance and not form, that the charge against the accused, when
before the Magistrate, should appear on the face of the deposition
or proceedings, and should not be ascertained merely by parol
evidence.

On the whole, therefore, I am of opinion that the deposition
or information in the present case should not have been received
in evidence; and, therefore, that the conviction of the prisoner
should be set aside.

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Common Pleas.

JONES v. WHELAN.*

(*Common Pleas.*)

THIS was an action of trespass *quare clausum fregit*. The case was tried before the Lord Chief Justice of the Common Pleas, during the Nisi Prius Sittings after Trinity Term 1864.

It appeared that the plaintiff was owner of certain property near Rathfarnham, in the county of Dublin, consisting of a private residence, called Bolton Hall, and of a mill, with a dwelling-house, offices, garden, &c., attached, called the mill premises, and which adjoined Bolton Hall. In the month of August 1860, the defendant agreed to take a lease of the mill premises from the plaintiff; and on the 7th of August in that year he was put into possession. On the 10th of April 1862 a lease was executed in pursuance of that agreement, whereby the plaintiff demised to the defendant "All that and "those the mill, together with the dwelling-house, sheds, out-offices, "and caretaker's lodge belonging thereto, and the garden in the "front and rere of the said dwelling-house, and the small field "adjoining the said mill, and lying between the avenue leading "to the mill and the main road, known as the mill meadow, and "containing two acres, statute measure, or thereabouts; all which "said premises are situate, lying and being at Willbrook, near "Rathfarnham, in the parish of Rathfarnham, barony of Newcastle, "and county of Dublin, and now in the occupation of the said "James Whelan; excepting and always reserving out of this demise "unto the said Philip Jones, his heirs, executors, administrators, "and assigns, all timber, &c.; to have and to hold the said demised "premises, with the rights, members, and appurtenances thereunto "belonging, or in anywise appertaining, except as before excepted, "unto the said James Whelan, his executors, administrators and

A lease demised a "mill, together with the dwelling-house, sheds, out-offices, and caretaker's lodge belonging thereto, . . . to hold the said demised premises, with the rights, members and appurtenances thereunto belonging or in anywise appertaining."—*Held*, that a piece of ground, which had been always occupied by the former tenants of the mill and dwelling-house, but which was not necessary to the enjoyment of either, did not pass.

* Before MONAHAN, C. J., and CHRISTIAN, J.

M. T. 1864. "assigns, from the 25th day of March last, for the term of fifty-
Common Pleas. "five years," &c. This lease was read in evidence by the plaintiff.

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It appeared that the *locus in quo* was a narrow strip of ground abutting on the garden, and separated from it, at the time the defendant went into possession, by a high privet hedge. Shortly after the execution of the lease, the defendant rooted up this hedge, and replaced it by a paling, but in such a way as to encroach on the plot of ground in dispute, which was the trespass complained of.—[The evidence as to the situation and nature of this piece of ground is fully given in the judgment of Mr. Justice CHRISTIAN.]—The question was, whether it passed by the lease? It was not contended by the defendant that it had been specifically demised; but the case made by him at the trial was, that it had been in his occupation at the time the lease was executed, and so that it passed under the words, "and now in the occupation of the said James Whelan," in the descriptive part of the lease.

At the close of the plaintiff's case, the defendant gave evidence to show that he was in occupation of the plot of ground in question at the date of the making of the lease, and was proceeding to examine witnesses to prove that it had been in the occupation of former tenants of the mill premises, when one of them stated that a person of the name of Nixon, who had been tenant immediately before the defendant, had held under a lease. The plaintiff's Counsel thereupon objected to the admission of any evidence of the occupation of the plot in question, either by Nixon or any former tenant. The learned Chief Justice, however, admitted the evidence subject to the plaintiff's objection.

At the close of the case, the plaintiff's Counsel called on the learned Chief Justice to direct a verdict for the plaintiff, on the grounds, first, that there were no words in the descriptive part of the lease sufficient to pass the plot of ground in dispute; and, secondly, that there was no evidence to go to the jury that it formed any part of the demised premises. He also objected to his Lordship leaving any question to the jury as to whether this plot of ground had been occupied by former tenants of the mill

premises; and called on him to withdraw from their consideration all evidence of tenure or occupation by such tenants. This his Lordship declined to do, and left the following questions to the jury:—First; whether the plot of ground in dispute was, at the time of the execution of the lease, part of the garden. Secondly; whether the plot of ground in dispute was occupied with the mill premises by the tenants thereof since the erection of the quickset hedge. Thirdly; whether at the time of the execution of the lease the plot in dispute was in the occupation of the defendant. The jury having answered the first question in the negative, and the second and third in the affirmative, his Lordship directed a verdict for the defendant, and reserved leave for the plaintiff to move to have that verdict set aside, and a verdict entered for him, if the Court above should be of opinion that on these findings the plot of ground in dispute did not pass by the lease of 1862; the verdict to be entered with nominal damages. The facts of the case, and the evidence, are more fully stated in the judgment of Mr. Justice CHRISTIAN.

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On the 5th of November, in the present term, *Chatterton* having obtained a conditional order to enter the verdict for the plaintiff, pursuant to leave reserved—

M. Morris, Sidney, and Palles, now showed cause.

Chatterton, Tandy, and J. H. Monahan, in support of the conditional order.

Sidney.

The *locus in quo* passed by the lease. The evidence showed that this plot of ground had been always occupied and enjoyed by the tenant of the mill premises; it was therefore capable of passing under the word “dwelling-house:” *Higham v. Baker* (a); *Co. Litt.*, 5 b; *Sheppard’s Touchstone*, p. 94. The word messuage in a devise will include a garden and curtilage: *Carden v. Tuck* (b).

Again, this is a demise of a dwelling-house, *habendum* with the

(a) Cro. Eliz. 15.
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(b) Cro. Eliz. 89.
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M. T. 1864. appurtenances; and land may be appurtenant to a house: *Hill v. Grange* (a); *Booche v. Samford* (b); *Yates v. Clincard* (c); *Smithson v. Cage* (d); *Smith v. Martin* (e); *Doe d. Norton v. Webster* (f); *Buck v. Nurton* (g); *Ongley v. Chambers* (h); *Loftes v. Palmer* (i); *Comyn's Digest* (Grant), E. 9; *Simpson v. Dendy* (k).

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The word "appurtenances" does not occur in the premises. Nothing can pass by the *habendum* which is not included in the premises: 1 *Sheppard's Touchstone*, p. 76; 2 *Roll. Ab.*, p. 65; 1 *Davidson's Conveyancing*, p. 97. The cases, therefore, which have been cited to show that land may be appurtenant to a house have no application. The *locus in quo* could not have passed under the word "dwelling-house," in the present case. Everything comprised in the lease, and which would have passed under that word—viz., "the garden," "out-offices," "caretaker's lodge," &c. &c., has been made the subject of specific demise. This shows that the word "dwelling-house" was used in its primary meaning. Therefore, evidence of the nature of the occupation and enjoyment was irrelevant and inadmissible. But, assuming that the word was used in the premises in its more extended meaning, the evidence has not brought the *locus in quo* within it. The test is, was this piece of ground necessary to the enjoyment of the dwelling-house? For unless it was, it did not pass: *Ferguson v. The London, Brighton and South Coast Railway Company* (l). But it is impossible, on the evidence, to contend that the full enjoyment of the house was of necessity dependant on the occupation of the *locus in quo*; and whatever argument might be used to show that it would have passed

(a) 1 Plowden, 164.

(c) Cro. Eliz. 704.

(e) 2 Saund. 401 a.

(g) 1 Bos. & Pul. 53.

(i) Palmer, 375.

(b) Cro. Eliz. 113.

(d) Cro. Jac. 526.

(f) 12 Ad. & Ell. 442.

(h) 1 Bing. 483.

(k) 6 Jur., N. S. 1197.

(l) 11 W. R. 1068; S. C., 33 Law Jour., Ch. 29.

under the word "garden," has been displaced by the finding of the jury.

M. Morris, in reply.

Cur. ad. vult.

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On this day, Mr. Justice CHRISTIAN delivered the judgment of the Court.

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Jan. 14.

This was an action of trespass *quare clausum fregit*. The material issue was, whether a strip of ground, on which the acts complained of in the plaint were admitted to have been done by the defendant, was the close of the plaintiff. The defendant was tenant to the plaintiff of certain premises, under a lease bearing date the 10th of April 1862, and the main question into which, on the argument, the case resolved itself was, whether, in the description in that lease of the thing demised, any terms, or any term, could be found under which the piece of land in dispute could pass; applying to that subject certain parol evidence given by the defendant, the propriety of receiving which, however, was also a question in the case. If no such term could be found, the *locus in quo* remained the property of the plaintiff; but if there could, it passed by the lease to the defendant.

The description in the lease is as follows:—"All that and those
"the mill, together with the dwelling-house, sheds, out-offices, and
"caretaker's lodge belonging thereto, and the garden in the front
"and rere of the said dwelling-house, and the small field adjoining
"the said mill, and lying between the avenue leading to the mill
"and the main road, known as the mill meadow, and containing
"two acres, statute measure, or thereabouts; all which said premises
"are situate, lying and being at Millbrook, near Rathfarnham, in
"the parish of Rathfarnham, barony of Newcastle, and county of
"Dublin, now in the occupation of the said James Whelan; except-
"ing and always reserving out of this demise unto the said Philip
"Jones, his heirs, executors, administrators and assigns, all tim-
"ber," &c.

It will be observed, that while this description is more than usually detailed, each separate subject being separately named, "mill," "dwelling-house," "sheds," "out-offices," "caretaker's

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lodge," "garden," "mill meadow"—there is in the premises an entire absence of any general terms, such as "*appurtenances*," "*lands thereunto belonging*," or the like, under which *other* subjects, not parcel of the things named, but attached to them by usage, might be held to be included. These words do occur in the *habendum*; but, on a principle of conveyancing familiar to us all, they cannot avail the defendant there. A new subject cannot be introduced by the *habendum*, and the grantee must stand or fall by the description in the premises. The words "now in the occupation of the said James Whelan" are in the premises; and one of the questions left by the Chief Justice to the jury was, whether Whelan was in possession of the disputed premises at the time of the execution of the lease. There was direct contradiction certainly about it; Mr. Jones asserting that in giving possession (which it will be remembered he had done, some year and a-half before the date of the lease, under an agreement) he expressly excluded the place in dispute; Whelan, on the other hand, asserting that nothing at all was said about it, but that he took possession of it as of course. The jury answered that question in the defendant's favour; but, in my opinion, that finding does not help him in the least. If it had been against him, it is possible that it might have prejudiced him; but unless he can point out in the previous part of the description some term capable in law of including the thing in dispute, the fact that it was then in his possession can avail him nothing, notwithstanding those words of reference to the things demised as being "then in his occupation."

Parol evidence (including a map) was given, and of course given without objection, to identify the subject of the demise. The map is not before me; and I speak from recollection since the argument; but I believe, speaking generally, the premises were as follows:—An avenue led up from the public road to the mill, with its attendant buildings. On the right of the avenue, before you reached the mill, lay the small field called the mill meadow. Passing that, you come to the mill, "with the dwelling-house, sheds, out-offices, and caretaker's lodge, belonging thereto," all lying together, and, so to speak, within one curtilage. Beyond the mill and dwelling-

house (*i. e.*, at the opposite side from where the avenue joined them), the garden extended backwards. These several items, with the little bit of garden or pleasure ground in front of the dwelling-house, *prima facie* exhaust the whole description in the premises of the lease. They were encompassed on all sides by land of the plaintiff—*i. e.*, another holding of his called Bolton Hall. Now, as to the particular spot in dispute.—The boundary of the garden along the length of one of its sides, running back from the mill and house, was a quickset or privet hedge, six feet high, and of some twenty or thirty years' growth. On the outer side of this hedge lay a narrow strip of ground, bounded on the other side by another hedge, which was on that side the extreme boundary of that part of the plaintiff's property called the mill holding. This strip was the *locus in quo*: it was called by some of the witnesses the avenue; it was not, however, like the front avenue, a metalled road; it was in grass; but it lay so that, if the mill and its yard had not intervened, it would probably have been the continuation of the front avenue, by means of which the plaintiff would have reached his Bolton Hall premises from the public road. The lease reserved to the plaintiff a right of way from the high road through the demised premises, to his lands at the rere of them; and it is probable that, in exercising that right of way, after passing over the front avenue, and through the mill yard, the rest of the plaintiff's way would be along this strip in dispute. But whether, in traversing that, he would be exercising his right of way, or walking on his own ground, would depend of course on the same question, which is now to be decided. There was a conflict in the evidence as to whether, when the defendant got possession, there was any fence at all at the end of this strip next the mill, &c. That controversy, however, is not material in the view I take of the case. The jury, as I have already stated, found in effect that the strip was part of what the defendant originally got or took possession of, and had possession of, when the lease was executed; and he (the defendant) swore he had possession of it throughout. On the other hand, the plaintiff swore that he always had the possession, and deposed to the acts

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of dominion done by him. On the finding of the jury, this fact must I think be assumed to be as the defendant asserted; but taking it so, it is very material to bear in mind that the way in which he utilized his possession was no more than this—he used to throw the refuse of his garden, weeds, dirt, and stones, upon it; and he used sometimes to put calves to graze on it. There was no door or passage through the hedge from the garden into it; and the jury, in answer to another question put to them by the Chief Justice, found that, at the time of the execution of the lease, it was no part of the garden, nor known as such. Such were the nature and locality of the thing in dispute.

In addition to the parol evidence heretofore noticed, the defendant also offered evidence to the following effect:—that, from the time when the plaintiff became owner of the mill premises, which was many years ago, and before the letting to the defendant, they had been held under him by a succession of tenants (some four or five I think), and that every one of them had occupied the strip in dispute. The plaintiff's Counsel objected to evidence of that class being admitted at all, but more particularly in two or three of the instances in which it appeared, on cross-examination, that the tenants had held under leases which were not produced. The Chief Justice, however, admitted the evidence; and, besides the two questions already mentioned, he left a third question to the jury, namely, "whether, from the time when Jones got possession of the premises, the piece of land in dispute was occupied by the several tenants and occupiers as portion of the mill premises?" And this the jury answered in the affirmative. The plaintiff's Counsel objected to any of those questions being left, and called for a direction. The Chief Justice, however, overruled these objections, and, applying to the description in the lease the last mentioned finding of the jury, directed a verdict for the defendant; but reserved to the plaintiff leave to move to change it, in case the Court should be of opinion that the evidence objected to ought not to have been received; or that the questions, or any of them, ought not to have been left; or if, upon the answers to them, he ought to have directed a verdict for the plaintiff.

In that state of facts, the first question is, whether the evidence objected to was rightly received? I am of opinion that it was. For the purpose of raising the question whether a subject, not itself named in the lease, was capable of passing as parcel of one of those which *were* named, it is obvious that evidence of the condition—I may say the history—of the former subject, in connection with the latter subject, was necessary and admissible. The absence of the former tenants' leases, in some of the instances, was an objection, and a very formidable one, to the weight of that particular evidence, but not I think to its admissibility; and, if the evidence was rightly admitted, I think it necessarily follows that the Judge was justified in putting to the jury the questions which he did; for it was no more than putting it to them to expressly affirm or negative the very propositions for the establishing of which the evidence was offered. The advantage of the course taken at the trial is this, that the Court, in now construing the lease, will do so with full knowledge of all material facts, and with the certainty that, whether its decision shall be right or shall be wrong, at least it will be conversant, not with mere abstractions, but with the truth and reality of the case.

It is therefore upon the findings of the jury upon the first and second questions left to them by the Chief Justice, as applied to the terms of the premises in the lease, that the real question in the case arises. The jury have found that the place in dispute is no part of the garden, *but* that always in the plaintiff's time the several tenants and occupiers of the mill premises have occupied it as portion of those premises. The question is, whether that latter fact, thus supplied to the Court by the jury, enables it to class this disputed *locus in quo* under any of the heads of description contained in the premises of the lease.

A great number of cases were referred to by the defendant's Counsel, which turned on the efficacy of such words as "appurtenances," "lands thereunto belonging," or the like, occurring in the premises of a deed or in a will, for the purpose of bringing under the operation of the instrument subjects which, though not named, were shown by parol evidence to have been connected in

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H. T. 1865. occupancy with those which were named. There is no small conflict of authority in the olden cases on the subject:—*Hill v. Grange* (a); *Higham v. Baker* (b); *Loftes v. Palmer* (c); *Doe v. Webster* (d); *Boocher v. Samford* (e); *Yates v. Clincard* (f); *Smithson v. Cage* (g); 1 *Saund.*, p. 400 a, n. 2; *Buck v. Norton* (h); *Ongley v. Chambers* (i).

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Upon these authorities I should be of opinion that, if the premises of this lease contained the word "appurtenances," or any equivalent term, the finding of the jury on the second question would entitle the defendant to retain his verdict. But I have already pointed out that no such term does occur in the premises. It does in the *habendum*; but we all know that a new subject cannot be brought in by the *habendum*, which may restrict and explain, but cannot enlarge the premises. Thus the whole of that class of authority on which I have been commenting, and which turned entirely on the force of these general terms, is excluded from application to the present case; and to sustain his verdict the defendant is driven to show that the *locus in quo* can be ranged under some one or other of the specific heads of description of which alone the enumeration of parcels in the premises in this lease is composed.

The defendant's Counsel, being asked by the Court to point out which of the heads of description they relied on for that purpose, answered "the dwelling-house." They might I think, with at least equal propriety, have said "the mill." It is clear, having regard to the finding of the jury respecting the garden, that, unless the spot in question can be brought under either of those two denominations, the defendant has no case. Therefore the class of authority which applies here is not the one which I have been just considering, but the much less numerous one which has settled what it is which is capable of passing under the word "house" or "messuage" *simpliciter*.

(a) 1 Plowd. 164.

(c) Palmer's Rep. 375.

(e) Cro. Eliz. 113.

(g) Cro. Jac. 526.

(b) Cro. Eliz. 15.

(d) 12 Ad. & El. 442.

(f) *Ibid*, 704.

(h) 1 Bos. & Pul. 53,

(i) 1 Bing. 483.

Now, with respect to that, it has been settled, since the time of Lord Coke, and much earlier, that, under "messuage" or "house," will pass not only the buildings, but the curtilage and garden also; the latter, however (the garden), not until after some doubt. But, from those times to the present, so far as I am aware, no other subject whatever has ever as yet been held to be comprised under those terms; and certain it is that land will not pass under them, merely because of an occupancy with the house, however close and prolonged. Is this *locus in quo* then part of the curtilage, or of the garden? The garden is excluded by the finding of the jury. The curtilage is in my opinion much more clearly out of the question, because that means properly the court which the buildings surround, or which immediately adjoins them. But it may be said, though this is not part of either garden or curtilage, yet it may be something so identified with the house as to fall under the same principle which has brought in the garden and curtilage; and if that were so, I think it ought to abide the same rule. Then the question presents itself, what is that principle? In my opinion that principle is *necessity*. The curtilage and garden were held to be parcel of the house, because they were necessary to its enjoyment. Nothing short of that—neither pleasure nor convenience—would do: *Carden v. Tuck (a)*; *Ferguson v. London, Brighton, and S. C. Railway Co. (b)*. Well then, that being the principle, the case is brought to this, can the Court now, on the facts found by the jury, predicate of this slip of ground that it was a thing of *necessity* to the enjoyment of the house or of the mill? Why, in the first place, no such thing is found by the jury, nor was any such question left to them, or asked to be left to them. Therefore, in any case, the verdict for the defendant cannot stand. Then arises the question, what course ought we now to take? If we saw the least reason to believe that the defendant's Counsel had made a slip in not calling on the Chief Justice to leave that question to the jury, or that there was evidence on which such a case could have been reasonably founded, we would merely set aside the verdict and direct a new trial. But we are clearly of

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(a) Cro. Eliz. 89.
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(b) 33 Law Jour. 29.
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opinion—at least, speaking for myself, I am clearly of opinion, that there was no colour for such a case; and that if such a direction had been asked for it would have been the duty of the Judge to have refused it, upon the ground that there was no evidence of it to go to the jury. I have already mentioned the uses to which alone it appeared in proof that the defendant used to put the place, though he went fully into his case in that respect; a depository for the refuse of his garden, or a place to turn calves now and then to graze. Well, these are matters of convenience, but they are plainly not of necessity. As a passage it led nowhere that the defendant had a right to go to. There was clearly, therefore, nothing to be tried which was not tried. The questions sent to the jury were the only questions which the evidence warranted, but the facts supplied by the answers to them fall short of what was necessary to sustain the defendant's case. The advantage of the course which was taken at the trial is, as I have already observed, that, instead of directing a new trial, we are enabled to see our way clearly on this motion, to bring the litigation to a close, by directing the verdict to be entered for the plaintiff, with nominal damages, pursuant to the leave reserved, which will accordingly be the rule of the Court.

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Queen's Bench

WILLIAM LUNHAM

v.

GEORGE HENRY WAKEFIELD and
 JOSEPH GODSDEN NASH.*

(*Queen's Bench.*)

Dec. 7, 17.
 H. T. 1864.
 Jan. 12.

DEMURRER.—Summons and plaint:—That, at the time of the committing of the grievances hereinafter mentioned, the plaintiff was not indebted to the defendants in the sum of £220. 7s. Od., or in any sum amounting to or extending to the sum of £50, or in any sum whatsoever; yet the defendants, maliciously contriving and intending to injure the plaintiff, and to make him commit an act of bankruptcy, and to sue out thereon a commission of bankruptcy against him, and to have him thereupon adjudicated bankrupt, or by reason of the fear of such proceedings to compel him to submit to the unjust demand made on him for the sum of £220. 7s. Od., hereinafter mentioned, and falsely alleged to be due by the plaintiff to the defendants,—falsely, maliciously, and without reasonable or probable cause, to wit, on the 8th day of October 1862, made or caused to be made an account in writing of the pretended particulars of a pretended demand of the defendants on the plaintiff for the sum of £220. 7s. Od., for goods falsely pretended to have been sold and delivered by the defendants to the plaintiff, with a notice thereunder requiring immediate payment thereof, purporting

The plaint alleged that the defendant W., having made demand of a certain sum of money on the plaintiff L., according to the form in the schedule to Irish Bankruptcy and Insolvency Act, falsely and maliciously, and without reasonable or probable cause, had a summons issued out of the Bankrupt Court, for the personal appearance of L.; that the bankruptcy proceedings were determined in favour of L.; and that L. had suffered much in his credit and re-

putation by having had to appear at the said Court. To this demurred

Held (dissentiente HAYES, J.), allowing the demurrer, that the plaint disclosed no cause of action.

Held also, that the suing out a commission of bankruptcy is not analogous to the proceeding by trader debtor summons.

Held (per HAYES, J.), that special damage was sufficiently averred.

* Before O'BRIEN, HAYES, and FITZGERALD, JJ.

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to be in the form, or to the effect specified in the schedule (F) to a certain Act of Parliament passed in the twenty-first year of the reign of her present Majesty, intituled "The Irish Bankrupt and Insolvent Act, 1857 ;" and afterwards, on the 7th day of November 1862, falsely and maliciously, and without any reasonable or probable cause, caused the said particulars of demand and notice requiring payment to be served at the plaintiff's place of abode ; and afterwards, falsely and maliciously, and without reasonable or probable cause, caused to be filed in the office of the Court of Bankruptcy and Insolvency in Ireland, an affidavit subscribed and sworn on behalf of the defendants by the said George Henry Wakefield, one of the defendants, and one Michael Collins, purporting to be in the form required by the said Act, in which affidavit the said George Henry Wakefield, on behalf of said defendants, and with the privity and assent of one Joseph Godsden Nash, amongst other things, falsely, maliciously, and without reasonable or probable cause, swore that the plaintiff was justly and truly indebted to the defendants in the sum of £220. 7s. 0d., for goods sold and delivered ; and thereupon the defendants falsely and maliciously, and without reasonable or probable cause, procured the Honorable Judge Lynch, being one of the Judges of the Bankruptcy and Insolvency Court, to issue a summons in pursuance of the said Act, whereby the plaintiff was required personally to be and appear before the Court of Bankruptcy and Insolvency at the said Court, Four-courts in the city of Dublin, on the 14th day of November 1862, at twelve o'clock, for the purpose of ascertaining in manner and form prescribed by the Irish Bankrupt and Insolvent Act, 1857, whether or not the plaintiff admitted the said demand of the defendants, who claimed of him the sum of £220. 7s. 0d., for a debt, or any and what part thereof ; or whether the plaintiff verily believed he had a good defence upon the merits to the said demand, or to any and what part thereof ; and the defendants falsely, maliciously, and without any reasonable or probable cause, caused a copy of the said summons to be served on the plaintiff. And the plaintiff says that he attended in pursuance of the said summons at the said Court, before the Honorable Judge Lynch, one of the

Judges of said Court, on the said 14th day of November, said Court being then open to the public, and there being divers persons therein, and did then and there, pursuant to the provisions of the said Acts, make a deposition upon oath that he verily believed he had a good defence on the merits to the said demand, as by same filed of record in said Court appears. And afterwards such proceedings were had that the said proceedings, so as aforesaid instituted by the defendants against the plaintiff in the said Court of Bankruptcy and Insolvency, have wholly ceased and determined in favour of the plaintiff. And the plaintiff avers that, by being compelled publicly to appear in the said Court of Bankruptcy and Insolvency, and by said several grievances so as aforesaid committed by the defendants, the plaintiff was greatly injured in his credit; and was for several days prevented from attending to his business, and incurred great costs and expenses in and about attending at the said Bankrupt Court, and resisting the said proceedings, and making the said deposition,—to the plaintiff's damage of £1000.

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To this plaint the defendants demurred, and noted for argument the following points:—

First; that no action will lie for such wrongs as are alleged in the writ of summons and plaint, inasmuch as all persons having a debt due to them, or claiming a debt to be due to them, by a trader, have a right to take the proceedings complained of, without being liable to be sued for so doing.

Secondly; that no action will lie for such wrongs as are alleged in the writ of summons and plaint, without an allegation of legal damage resulting to the plaintiff therefrom; and that there is no sufficient allegation of legal damage so resulting in the writ of summons and plaint.

Devitt and *C. R. Barry*, in support of the demurrer.

This action is not maintainable on the construction of the 20 & 21 *Vic.*, c. 60, ss. 105–13, schedules E to K, and the Rules of the Court, 37 to 43. There is no allegation of fraud, so that this case is not ruled by *Pim v. Wilson* (a). For a proceeding,

(a) 2 Phil. Ch. Cas. 653.

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without malice, in a Civil Court of competent jurisdiction, no action will lie: *Savile v. Roberts* (a); *Purton v. Honnor* (b). Of course, an action will lie for maliciously having a party sued and made a bankrupt. But that proceeding has the effect of an execution against the man's property; and that case bears no analogy to this, where a man has been merely brought into Court to state whether he owes a debt: *Chapman v. Pickersgill* (c); *Farley v. Danks* (d). But neither in these nor in any of the intermediate cases has it ever been decided that an action will lie for a malicious attempt to make a man a bankrupt, when bankruptcy does not in fact result.

But, even if such an action would lie, this plaint does not contain a sufficient averment of special damage. Unless an award of costs is shown, extra costs not awarded are not a ground of special damage in law: *Cotterell v. Jones* (e). The 20 & 21 Vic., c. 60, s. 113, enables the Court of Bankruptcy to award costs. There is not any averment that they were awarded, and the defendant is therefore entitled to assume that they were not.—[FITZGERALD, J. The Court of Bankruptcy has a discretionary power to give costs. If it does not give them, is not that a damnification?—According to the decision in *Cotterell v. Jones*, it is not a legal damage. The averment of special damage is therefore reduced to the allegation that the plaintiff was greatly injured in his credit.—[FITZGERALD, J. The plaint states no instance of injury.]—No; and the Court must take cognizance of the practice of the Bankruptcy Court, which is to enter such cases in the daily lists *anonymously*.—[FITZGERALD, J. But we must also take cognizance of this practice, that the cases are investigated in public Court.]—But the party can, if he likes, have a Private Sitting under the 20 & 21 Vic., c. 60, s. 354. The non-introduction into Ireland of the provisions of the 12 & 13 Vic., c. 113, s. 86, has left parties simply to their remedy under the 20 & 21 Vic., c. 60, s. 113. Moreover, though the sections of that Act require in terms the party summoned to appear in person in the Bankrupt Court, yet, under the Rules of that Court, personal appearance is not necessary. Counsel

(a) 1 Salk. 14.

(b) 1 Bos. & P. 205.

(c) 2 Wils. 145.

(d) 4 El. & Bl. 493.

(e) 11 C. B. 713.

also cited *Anonymous* (a); *Reynolds v. Wilson* (b); *Haddan v. M. V. 1863.*
Lott (c); *Fivaz v. Nicholls* (d); *Florence v. Jenings* (e). *Queen's Bench*

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Waters and Heron, contra.

No doubt a creditor who has a just claim has a right to proceed against his debtor in the Bankrupt Court. But the plaintiff avers here that he did not owe *anything* to the defendant; who must therefore argue that a man may, though he has not a just claim or any claim, take these proceedings to make a man a bankrupt; and yet that no action for such malicious conduct will lie against him, though an action admittedly lies for a malicious abuse of civil process. A man who has been improperly arrested under a fiat may bring an action for the false arrest.—[FITZGERALD, J. Have you found any instance of maliciously instituting an action for an unfounded debt or claim where an arrest has not been made?]
 There is a great difference between instituting proceedings in bankruptcy, and a simple attempt to recover a debt. In the former case, even the recovery of costs is not a sufficient redress. Any man brought into the Bankrupt Court, however unjustly, is tainted. But a man's character suffers no injury when an unfounded action is brought against him: to him costs are an entire compensation: besides, a defendant need not appear personally; his defence may be conducted by his attorney and witnesses, while he remains in the country attending to his business. But the summons to the Bankrupt Court resembles a summons to a police-office. The party summoned must appear personally, no matter what the injury to his trade may be, and how remote soever his dwelling may be from Dublin. If he fails to appear in person, that is an act of bankruptcy; and that the damage is great, appears from this, that to say of a trader that he is a bankrupt is actionable.—[FITZGERALD J. I think it is inaccurate to say that a trader who does not appear *in person*, when summoned to the Bankrupt Court, becomes *ipso facto* a bankrupt. He does not become a bankrupt unless the summoning

(a) 1 Fonbl. Bank. Cas. 134.

(b) 1 Wils. 232.

(c) 15 C. B. 411.

(d) 2 C. B. 501.

(e) 2 C. B., N. S. 454.

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creditor proves his debt legally.]—The 20 & 21 *Vic.*, c. 60, s. 108, makes him a bankrupt—[FITZGERALD, J. He is liable to become a bankrupt. But, when the summoning creditor sues out a petition in bankruptcy, and comes to establish the act of bankruptcy, he must prove his debt clearly.]—The Bankrupt Code is to be applied only to insolvent or to dishonest traders. To take proceedings to make a man a bankrupt is therefore to assert that he is an insolvent or a dishonest trader; in each case a *stigma* is involved in the accusation. An action undoubtedly lies for maliciously commencing civil process against a man, for the mere purpose of vexing him: 1 *Co. Lit.*, 161 a, note 4; *Waterer v. Freeman (a)*. In *Chapman v. Pickersgill* the commission of bankruptcy had been superseded; and it was, as this case is, a mere *attempt* to make a man a bankrupt.—[FITZGERALD, J. In that case I see that the plaintiff was declared a bankrupt.]—Certainly, in *Farley v. Danks (b)* he was not. In *Goslin v. Wilcock (c)*, Lord Camden said that an action for a malicious arrest lies, “because the costs in the cause are *not* a “sufficient satisfaction for imprisoning a man unjustly, and putting “him to the difficulty of getting bail for a larger sum than is due.”—[FITZGERALD, J. That was a case in which legal process had been abused.]—And so is the present case. The Bankrupt Act was not meant as an ordinary mode of recovering debts, nor as a remedy when there is any matter in dispute between the parties. Proceedings taken maliciously to force a man to commit an act of bankruptcy give a cause of action: *Churchill v. Siggers (d)*. The case of *Savile v. Roberts* is better reported in 1 *Lord Ray.*, page 374; which also shows the distinction between an action which is merely unfounded, and one brought for purposes of vexation.—[Counsel also cited *Hilliard on Torts*, p. 466, and *Add. on Wrongs*, p. 441.]—*Cotterell v. Jones (f)* is not an authority against the plaintiff here, because there the principal point in the case was not decided; and, with respect to the costs, there is this distinction, that in *Cotterell v. Jones* the plaintiff had been entitled to get costs

(a) 1 Hob. 205. 266.

(c) 2 Wils. 302.

(e) 11 C. B. 713.

(b) 4 Eil. & Bl. 493.

(d) 3 Eil. & Bl. 929.

(f) 11 C. B. 713.

as a matter of course, and the Court *presumed* that he had sustained his injury solely by his own neglect to apply for them. But the present plaintiff was not entitled to get costs as a matter of course. The Judge of the Bankrupt Court has a discretion in the matter; so that negligence cannot be *presumed* against the plaintiff. Of the other cases cited for the defendant, *Haddan v. Lott* (a) is the only one which relates to special damage; and the point decided in it was merely that, in that particular case, the special damage averred had not flowed naturally from the acts complained of. Counsel also cited *Craig v. Hassell* (b); *Grainger v. Hill* (c); *Haywood v. Collinge* (d); *Rolin v. Steward* (e); *Oldfield v. Dodd* (f); *Martin v. Lincoln* (g); and two unreported cases of *Fitzpatrick v. O'Brien* and *Darcy v. Cahill*.

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Devitt was heard in reply. He cited *Shelf. Bank.*, pp. 158 to 176.

Cur. adv. vult.

FITZGERALD, J.

This case was argued before us on the 7th of December last; and as the question, which arose on a demurrer to the plaint, was of considerable practical importance, we took time to consider the arguments addressed to us, and the numerous authorities to which we were referred.—[See statement.]—The complaint against the defendants is in substance that, there being no debt due to them by the plaintiff, they took the proceedings in question maliciously, and without any reasonable or just foundation; and the plaint contains strong expressions, and imputes very criminal motives; but these allegations are no farther material for the decision of the question now before the Court, save as showing “malice” and “want of probable cause.”

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I may observe, too, that the defendants' proceedings could not have the effect of compelling plaintiff to commit any act of

(a) 15 C. B. 411.

(b) 4 Q. B. 481.

(c) 4 Bing., N. C. 212.

(d) 9 Ad. & Ell. 268.

(e) 14 C. B. 595.

(f) 8 Ex. Rep. 579.

(g) Buller's N. P. 12.

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bankruptcy, if there was no debt due to them ; that there is no such proceeding known now to our law as a commission of bankruptcy. The point raised by the demurrer for our decision is, whether the action lies either without an allegation of any special grievance to the person or property of the plaintiff, or with such damage as is alleged in the plaint? In order to approach that question properly, it is expedient to consider shortly the history, character and effect of the proceeding by trader debtor summons. Prior to the passing of the 1 & 2 *Vic.*, c. 110, in England, and the 3 & 4 *Vic.*, c. 105 (*Ir.*), every creditor to whom a debt of £20 and upwards was due possessed a summary power of imprisoning his debtor, by making an affidavit of debt, and suing out thereon a *capias*, popularly known in this country as a "marked writ." The statutes I have referred to potentially abolished imprisonment for debt on mesne process, save in certain cases ; but in abridging the remedy of the creditor against the person of his debtor, the Legislature intended to give, and did give, to the creditor additional facilities against the property of the debtor.

Before the abolition of arrest for debt on mesne process, the majority of acts of bankruptcy, such as "beginning to keep house," "departing from his dwelling-house or place of business," "denial to a creditor," "lying in prison," &c., were commonly procured or occasioned by the issuing of a marked writ ;—a proceeding which was ordinarily adopted to coerce an insolvent trader to commit an act of bankruptcy, and thereby render his property distributable amongst the creditors equally.

When, therefore, the remedy of the creditor was so largely interfered with by the abolition of arrest on mesne process, the Legislature thought it expedient to provide a substituted means of compelling a trader to pay an *admitted* or ascertained or undisputed debt, or if he failed to do so, then to subject his property to distribution in bankruptcy. Accordingly, by the eighth section of each of the statutes 1 & 2 *Vic.*, c. 110 and 3 & 4 *Vic.*, c. 105, the creditor is empowered to file an affidavit of his debt in Chancery ; and, if on service of a copy of it with a notice demanding immediate payment, the debtor should not, within forty-one days, pay the debt,

or give bail to pay such sum as should be recovered against him, with costs, he thereby committed an act of bankruptcy.

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That statutable provision was not found to be effectual in operation, and, moreover, it was not difficult to evade it; and, therefore, when Lord Brougham's Bankruptcy Act, 5 & 6 *Vic.*, c. 122, passed, by the 11th to the 19th sections, the analogous but more effectual remedy of a trader debtor summons was added in England.

The 12 & 13 *Vic.*, c. 107, extended in practice to this country most of the provisions of the 5 & 6 *Vic.*, c. 122; and amongst others, the proceeding by trader debtor summons. The sections of the Irish Act which refer to it are also 11 to 19.

The 12 & 13 *Vic.*, c. 107, is repealed by the present Irish Bankruptcy Act, 20 & 21 *Vic.*, c. 60, but many of its provisions are re-enacted in modified forms, and especially those relating to the trader debtor summons, save section 19, which is not re-enacted.

The general policy of the 20 & 21 *Vic.*, c. 60, as to traders, is to prevent fraud; relieve them from imprisonment and oppression; give additional facilities for the creditor against the property of the debtor; and to secure an equal distribution of that property, if the debtor could or would not pay an admitted or ascertained demand. Accordingly, by section 99, if a trader shall not, within fourteen days after demand, pay, secure or compound, for a judgment debt for which the creditor was entitled to sue out execution, he thereby commits an act of bankruptcy.

Section 99 places an order of a Court of Equity for the payment of money on the same footing as a judgment; and section 103 provides an analogous remedy in case of a debt due by a trader having privilege of Parliament.

Section 104 contains a provision analogous to section 8 of the 3 & 4 *Vic.*, c. 105, but fixing fourteen days after demand as the time for payment, instead of forty-one days.

Sections 105 to 112, inclusive, regulate the proceeding by trader debtor summons. The procedure may, in a simple case be thus described:—If a creditor has a demand on a trader, to the extent of

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£50 or upwards, he may serve an account in writing of his demand, on his debtor, with a notice requiring immediate payment; if not paid, he may then make an affidavit of his debt and of the demand of payment, and thereupon obtain, out of the Court of Bankruptcy, a summons to the trader debtor, requiring him personally to appear in Court on a day specified, and state "whether or not he admits the demand, or any and what part thereof, or whether he has a good defence on the merits to the demand, or any part of it."

If the debtor admits the debt, he is under no necessity to attend the Court, for he may, under section 112, sign an admission out of Court, and file it. If, on the other hand, he denies the debt, he should attend the Court in person, and, as was done in the present case, make and file a deposition that he has a good defence on the merits. The Court may examine into the particulars, and either leave the creditor to assert his demand as best he can, or it may require the trader to enter into a bond with sureties to pay such debt and costs as the creditor may recover in an action to be brought to enforce his demand. The trader who admits the demand, but does not pay it within the prescribed period, thereby commits an act of bankruptcy; and, on the other hand, if the debtor appears on the summons, and refuses to admit the debt, but at the same time declines to make an affidavit of merits, or, if so required, to enter into the statutable bond with sureties, he thereby commits an act of bankruptcy. But it is to be observed, in relation to this special class of acts of bankruptcy, that the foundation of the whole proceeding is, that the creditor has a debt really due to him of the required statutable amount. If the debt for which the summons is sued out is not due, there can be no act of bankruptcy committed in respect of it; and should the creditor afterwards petition for an adjudication of bankruptcy, his first step is to prove legally that the debt he claims is due to him. The essential character of the trader debtor summons is that of a proceeding by a creditor to enforce payment of his debt, and it is frequently adopted as collateral to an action for the same demand; if the debt is admitted, and not paid within the statutable period, or if, being disputed, the debtor declines to show that his controversy

is *bona fide*, by making an affidavit of merits, the creditor, after the lapse of the statutable period, is at liberty to proceed in bankruptcy to enforce payment of the debt due to himself and all the other creditors, equitably and equally. I am not aware of any authority on this subject, save the opinion of Lord Cottenham, in the case of *Price v. Wilson (a)*, to which Mr. Devitt referred us in the course of the argument. The suit there did not relate to a trader debtor summons, but was instituted to restrain the analogous proceeding by notice, affidavit, and demand of payment, under the 1 & 2 Vic., c. 110, s. 8; and Lord Cottenham, without hearing a reply, said:—"There was no more reason, but "rather less, for interfering with the proceeding of which the "plaintiff complained, than there was before the statute 1 & 2 Vic., "c. 110, for interfering with the right of arrest on mesne process. "The Act had introduced no new hardship, but, on the contrary, "a great benefit to the debtor, by substituting the present proceed- "ing against his property for the former power of arrest of his "person, by which he was liable to be thrown into prison, and "thereby incapacitated from providing for the payment of his "debts. If the proceedings sought to be restrained had been a "mere action, there could have been no doubt; the only equity "suggested being, that no debt was in fact due. Yet where was "the difference between the two proceedings? Both were remedies "for the recovery of debt, and in both the law must take its course "in the absence of equitable grounds of interference." Such being the character of this special proceeding, the plaintiff contends, that the action lies for instituting it maliciously and without any foundation, and is maintainable whether special damage has arisen or not. The defendant, on the other hand, alleges, that the present action is one without precedent, and is not maintainable; and that, if it lies at all, it would lie only in respect of some special grievance which the plaint does not allege.

A great many authorities were cited on each side, to some of which I will have occasion to advert. It may be stated generally, that an action on the case lies against any person who maliciously, and

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(a) 2 Ph. Ch. Cas. 656.

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without probable cause, *prosecutes* another on a criminal charge, where the party prosecuted thereby sustains an injury in person, property or reputation; and it is termed in the earlier books, "an action on the case, in the nature of a conspiracy," from its analogy to the old action for a conspiracy—as, for instance, in *Marsh v. Veal* (a) and *Mills v. Mills* (b). The grounds of the action for a malicious *prosecution* are: malice—want of probable cause; that is, the absence of any good or rightful foundation for the prosecution; and, lastly, injury to the plaintiff by reason of the prosecution, either in his person by imprisonment, in his fame by the scandal, or in his property by the expense he has been put to in defending himself from the charge. [See the elaborate judgment of Chief Baron Gilbert in the case of *Young v. Givin*, *Gilbert's Rep.*, pp. 185 and 202.] By analogy to the action for a malicious prosecution, the law has in modern times permitted an action for maliciously arresting, or holding a party to bail, either where there is no debt or where the arrest is for a larger sum than is really due: and, as observed by Lord Camden, in *Goslin v. Wilcox* (c), "There are no cases in the old books, of actions for "suing where the plaintiff had no cause of action; but of late "years, where a man is maliciously held to bail where there is "nothing due, or where he is maliciously arrested for a great deal "more than is due, this action has been held to lie, because the "costs in the cause *are not a sufficient satisfaction for imprisoning "a man unjustly.*"

In *Savile v. Roberts* (d), Lord Holt gives the reason for the bill as to civil actions thus:—"So to bring an action, though there "be no good ground, is not actionable, because it is a claim of "right, and he has found pledges, and is amerciable *pro falso "clamore*, and is liable to costs; but yet if one has a cause of "action to a small sum, and take out a *latitat* to a very great sum, "or has no cause of action at all, and yet maliciously sues the "plaintiff to the intent to imprison him for want of bail, or do him "some special prejudice, an action of the case lies; but then it is

(a) Cro. Eliz. 701.

(b) Cro. Car. 239.

(c) 2 Wils. 305.

(d) 1 Salk. 14.

“not enough to declare generally that he brought an action against him *ex malitiâ et sine causâ, per quod* he put him to great charge, &c., but he must show the *gravamen* specially, as in 1 *Sid.*, p. 424—i. e., whereas he owed the defendant £100, he sued him for £500, and, to hinder him from bail, affirmed to the Sheriff £500 was due, *per quod* he was imprisoned for want of bail; in 1 *Saund.*, p. 228, for that the defendant intending to procure his imprisonment where there was no cause of action, or without any cause of action, sued him in an action for £300, whereupon he was arrested and imprisoned, &c.” *Savile v. Roberts* is also reported in 1 *Lord Raymond*, p. 374 and 12 *Mod.*, p. 208. The plaintiff relied on the report of this case in *Lord Raymond*, in which the matter relied on is thus stated:—“There is a great difference between the suing of an action maliciously, and the indicting of a man maliciously. When a man sues an action, he claims a right to himself, or complains of an injury done to him; and if a man fancies he has a right, he may sue an action. 4 *Co.* 17 *a*, makes a difference, that if a man calls *A*, who is heir-at-law to *B*, a bastard, *A* may have an action against the man; but if the man says *A* is a bastard, and I am heir to *B*, no action lies. If then the law will permit a man to make a false claim out of a Court of Justice, *a fortiori* when he proceeds to assert his right in a legal course. Secondly; the Common Law has made provision, to hinder malicious and frivolous and vexatious suits, that every plaintiff should find pledges, who were amerced if the claim was false; which judgment the Court heretofore always gave, and then a writ issued to the coroners, and they offered them according to the proportion of the vexation.—See 8 *Co.* 39 *b*, *F. N. B.*, 76 *a*.—But that method became disused, and then, to supply it, the statutes gave costs to the defendants. And though this process of levying of amercements be disused, yet the Court must judge according to the reason of the law, and not vary their judgment by accidents. But there was no amercement upon indictments, and the party had not any remedy to reimburse himself, but by action. Secondly; If *A* sues an action against *B* for mere vexation, in some cases

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v. "to the Court to be manifestly vexatious: 1 *Sid.* 424, *Drew v.*
WAKEFIELD. "*Swain*, where the special cause was the holding to vexatious
 "bail:"—pp. 379–80. By "manifestly vexatious" is obviously
 meant that the malicious proceeding has caused some special
 vexation or grievance to the plaintiff.

In *Purton v. Honner* (a) the authority of *Savile v. Roberts*
 was recognised; and it was held in accordance that an action
 did not lie for instituting a vexatious ejectment. It was ad-
 mitted, on the part of the plaintiff, that there was no decision
 that an action lay for maliciously suing where there was no
 debt due; but he relied on the judgment of Lord Hobart, in
Waterer v. Freeman (b), *Hargreave's note* to *Co. Lit.*, 161 a, and
Martin v. Lincoln (c). *Buller* gives but a short note of *Martin v.*
Lincoln, as decided in C. B., 25 Chas. II; and I have not been
 able to find any note of it in *Vaughan* or *Carter*, *Sir Thomas*
Jones, or any of the cotemporaneous reports. The note in *Buller*
 is:—"Case, for that the defendant *machinans* to deprive him of
 "his liberty, *absque aliquâ probabili causâ prosecutus fuit quod-*
dum breve de privilegio out of the Court of C. B.; and after
 "he had put in an appearance, that the defendant knowing he
 "had no probable cause, suffered himself to be nonsuited. After
 "verdict or not guilty, it was moved in arrest of judgment that the
 "action would not lie. North, C. J., said, the contrary is adjudged
 "in *Waterer v. Freeman* (d), and that upon good reason; and it
 "is in the discretion of the Judge to direct the jury, if there be
 "manifest proof that there is no cause of action; and Ellis said
 "that the cause was tried before him, and that it was apparent
 "*the suit was merely vexatious.*—*Martin v. Lincoln*, in 27 *Car. 2.*"
 There can be no doubt that the writ of privilege there mentioned
 was the old attachment of privilege under which the defendant was

(a) 1 Bos. & P. 205.

(b) 1 Hob. 205, 266.

(c) B. N. P. 13.

(d) Hob. 266.

arrested and held to bail; and, if so, *Martin v. Lincoln* does not conflict with the statement of Lord Camden in *Goslin v. Wilcox*. H. T. 1864.

Waterer v. Freeman is frequently referred to in the earlier books; and, although the portion of the judgment principally relied on by the plaintiff is but a *dictum* of Lord Hobart, it is nevertheless entitled to great attention. Lord Coke describes Lord Hobart as "a most learned, prudent, and religious Judge;" and *Jenkins* says:—"Lord Coke and Lord Hobart have furnished surprising light to the professors of the law: they were two men of great authority, who to the most accurate eloquence joined a superlative knowledge of the law." Queen's Bench
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Waterer v. Freeman is compendiously given in *B. N. P.*, page 12, from which I now quote the passage relied on by plaintiff.

"Now to the principal case, if a man sue me in a proper Court, yet if his suit be utterly without ground of truth, and *that certainly known to himself*, I may have case against him for the undue vexation and damage that he putteth me unto by his ill practice. But two circumstances are to be observed to maintain actions in these cases: first, the new action must not be brought before the first be determined, because till then it cannot appear that the first was unjust: *Farrel v. Nun*(a); *Lewis v. Farrell*(b). Secondly; that there must be not only a thing done amiss, but also a damage, either already fallen upon the party, or else inevitable"—pp. 12 and 13.

It will not be necessary now to criticise the proposition thus laid down, if it is to be taken with the qualification that the damage "present or inevitable," flowing from the wrongful act, be somewhat other than the costs of defending a civil suit. *Hargreave's note* to *Co. Lit.*, 161 a, contains the following passage:—"I apprehend too that such action lies, as well where the vexation is practised by a civil suit as where it is carried on through the medium of criminal process;" but other parts of the same *note* seem to convey doubt as to his position, for which he cites no decision, but relies on the *dicta* of Lord Hobart in *Waterer v. Freeman*, of Lord Holt in *Savile v. Roberts*, and of Rolfe, C. J., in *Atwood*

(a) B. R. T.; 5 G. 3, S. P.
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(b) 1 Str. 114, S. P.
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H. T. 1864. *v. Monge (a)*, where he says:—"And I hold that an action on the Queen's Bench
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 v. "case will lie for maliciously bringing an action against one where
 "he had no probable cause."

WAKEFIELD. The plaintiff further contended that the proceeding by trader debtor summons was not to be likened to a suit at law to enforce a debt; that it was peculiar in its nature—imputed insolvency to a trader, and was therefore defamatory to his character as such; and, when maliciously adopted, an action lay for the wrong, even though no special damage was sustained: and he likened it to the old proceeding of suing out a commission of bankruptcy, and relied on *Chapman v. Pickersgill (b)*, the marginal note to which is, "Case, for falsely and maliciously suing out a commission of bankruptcy, which was afterwards superseded, is a very proper action, though the Chancellor has power to give £200 damages by statute." It appears however, on examining the report, that there had been an adjudication of bankruptcy under the commission, and that the commission was subsequently superseded, no act of bankruptcy having been committed. When we call to mind the nature of the old commission of bankruptcy, and its consequences, it would be strange indeed if the action did not lie in *Chapman v. Pickersgill*. A bankrupt was formerly considered in the light of a mere criminal; and Sir E. Coke observed that "we fetched the name as well as the wickedness of bankrupts from foreign nations." To illustrate the spirit in which the Bankrupt Code was formerly administered, I may refer to judicial records, from which it appears that, in 1712, Richard Towne, a bankrupt, was executed for concealing his effects; in 1756 Alexander Thompson, an embroiderer and bankrupt, was executed, for not surrendering; and in 1761 (the year before *Chapman v. Pickersgill* was decided), John Perrott, of Ludgate-hill, a bankrupt, was executed for concealing his effects.—[See note to 2nd *Burr.*, p. 1216]. The Bankrupt Law has now assumed a different character and spirit: the bankrupt trader is no longer considered an offender; privileges and protection are afforded to him; and the great objects of the code are to prevent frauds and oppression, and to enforce equality amongst the creditors, by insuring an

(a) *Styles' Rep.* 379,

(b) 2 *Wils.* 145.

equitable distribution of the assets. According to the old law, too, a commission of bankruptcy could be obtained only on a petition to the Chancellor, verified by affidavit, stating "that the trader was a bankrupt;" and the effect on an adjudication was, to deprive the trader *prima facie* of all rights of property—to destroy his position and character as a trader, and impose on him all the consequences of the Law of Bankruptcy. The maliciously suing out of a commission, and obtaining an adjudication, was therefore necessarily defamatory to a trader, and worked grievous wrong to him in his person and property. It seems to me that there is no real analogy between an action for maliciously procuring a trader to be adjudicated a bankrupt, and the present action for maliciously suing out a trader debtor summons, and compelling the trader to appear and make an affidavit of merits. It has been urged, however, that the plaintiff has shown that he has sustained special damage from the defendant's vexatious proceeding, and that therefore the action lies, even although it would not have been otherwise maintainable.

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The allegation of damage in the plaint is as follows—[see statement]. The damage stated is three-fold:—

First; injury to plaintiff's credit by the defendant's proceedings. But this seems to be an allegation of damage which the law cannot recognise as the consequence of defendant's proceedings. The trader debtor summons contains no imputation on the debtor; it does not allege that he is bankrupt or insolvent; it is a proceeding which may be adopted against the most solvent merchant in the community; and it seems to me that, if we were to hold the action to be maintainable in this respect, we must apply the same rule in the case of a suit brought against a trader for any large unfounded claim.

Secondly; that the plaintiff was prevented for several days attending to his business. This allegation does not aid the plaintiff. In most cases of civil proceedings a similar loss of time may be occasioned to the defendant: as, for instance, where the defendant is compelled to appear as a witness, either on a summons from the plaintiff, or to maintain his own defence, or to answer interrogato-

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ries, &c. &c. It has never yet been alleged that the defendant in a civil suit for an unfounded demand could maintain an action against the plaintiff, for his loss of time in substantiating his defence.

Thirdly; the expenses and costs the plaintiff is put to in resisting the proceedings. A passage in Lord Holt's judgment, in *Savile v. Roberts*, seems to be applicable. He therê says:—"It is not enough to allege per quod he put him to great charge, but he must show the grievance specially, &c." The trader debtor summons does not necessarily involve the trader in any expense. If he denies the demand, his deposition that he has a just defence on the merits is made in open Court, and at the expense of the estate. He does not need the aid of either Counsel or attorney—is not subject to any fees of Court—and if he does sustain any costs, section 113 amply provides for them—"Every such trader shall have such costs as the Court shall in its discretion think fit." The Court of Bankruptcy is constituted the tribunal to determine whether the trader is or is not entitled to costs. If he was put to any costs, he might have had them awarded to him on application to the Court. It does not appear whether or not he made any such application, or whether any rule was pronounced by that Court in respect of costs.

The case of *Cotterel v. Jones* (a) in its decision has a strong bearing on this part of the plaintiff's pleading. Upon the whole case, it seems to me that the proceeding by trader debtor summons, followed up only to the extent of forcing the alleged debtor to admit the demand, or make an affidavit that he has a good defence on the merits, is to be regarded in the same light as a proceeding to enforce payment of an alleged demand; that the present action is one of the first impression, and does not lie; and that, if at all maintainable, it would lie only in case of some special grievance, the legitimate consequence of the defendant's unfounded proceeding and that none such has been shown in the present case.

I am of opinion therefore that the defendant is entitled to our judgment; but I have not arrived at that conclusion without

(a) 11 C. B. 713.

considerable hesitation, and somewhat of regret. I am aware that this peculiar and summary proceeding by affidavit and trader debtor summons has frequently been oppressively adopted, to compel a trader to plead to a claim which he disputed; and the observation of Rolle, C. J., in *Atwood v. Monge*, that if such actions as the present were maintainable, “and *were used to be brought*, “*it would deter creditors from such malicious courses as are often put in practice*,” appears to be not inapplicable. It would seem, however, as if the Legislature had intended in this country to relieve this peculiar proceeding from any special consequences, in case of failure to substantiate the demand. It is to be remembered that, by the 12 & 13 Vic., c. 107, s. 19, it was provided that, if a creditor who had taken proceedings by affidavit and summons, should not afterwards recover the *amount* of the sum for which he had filed the affidavit in an action to be brought against the trader, the defendant would be entitled to the costs of the suit, if it should be made appear to the Court that the plaintiff had not reasonable or probable cause for making such affidavit to the full amount. The 12 & 13 Vic., c. 107, has been wholly repealed; but section 19 has not been re-enacted; nor is there any corresponding provision to be found in the last Bankruptcy Act. Section 19 of our Act was taken in terms from the English Bankruptcy Act (5 & 6 Vic., c. 122, s. 19); and that special provision has been re-enacted, and is still in force in England.—[See 12 & 13 Vic., c. 106, s. 86 (*Eng.*), and *Pratt v. Goswell* (a)].—The omission to re-enact the provisions of section 19 in this country was not accidental, but was the result of deliberation; and we must assume that the Legislature, having in view the decisions on the analogous section of the English Act, which preceded *Pratt v. Goswell*, repealed section 19 of the Irish Act, and did not re-enact it in favour of the commercial creditor, and with intent to free the proceeding by trader debtor summons from any special responsibility other than the costs of the summons, if the Court should think fit to award such costs.

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(a) 9 Scott, C. B., N. S. 710.

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HAYES, J.

The complaint of the plaintiff (who is described as of Tralee, in the county of Kerry) is in substance, that the defendants, having no debt whatsoever owing to them by the plaintiff, or any claim upon the plaintiff, nevertheless, maliciously and without probable cause, fabricated the necessary documents grounding an application to the Bankrupt Court, in which it was averred that the plaintiff owed them £227. 7s., and sued out of that Court a trader debtor summons, by virtue of which the plaintiff was required to leave his place of abode, and personally to appear at the public Court in Dublin, for the purpose of the Court's ascertaining whether he admitted the demand thus falsely and maliciously made on him by the defendants, or had a good defence thereto; that in pursuance of the summons served on him, the plaintiff attended personally in Court, and made a deposition to the effect that he had a good defence, on the merits, to the demand of the defendants; after which the proceedings there were wholly determined in favour of plaintiff; and the plaintiff avers that by reason of these proceedings of the defendants, and by his being thus compelled to attend in Court, he has been prevented from attending to his business, and has incurred great costs and expenses. To this the defendants answer:—"No doubt this may be all true; but, true as it may be, you have no remedy at law." Now the question for us to decide on this demurrer is, whether it is so or not. And if it be the fact that the plaintiff is remediless in the premises, then the plain consequence will be that a most effective and successful contrivance has been discovered, by which any respectable and solvent trader may be worried and annoyed in time, property and person, even perhaps to his ruin, with perfect safety to the malignant. I am of opinion that that is not the law, and that this plaint discloses a sufficient cause of action. A great number of authorities has been cited in the argument; to the greater part of which I shall not particularly refer, as I believe they have no special bearing on the present case. There is, I think, enough of authority however to sustain this as a legal proposition, that when a person maliciously and without probable cause resorts to a legal tribunal and takes

proceedings there against another, so as thereby to cause him a special damage, he is liable to an action in respect of such damage. In *Roberts v. Savile* (a) it is laid down, that the mere bringing of a groundless action is not actionable; and for this plain reason, that, although general damage has ensued thereby, the law presumes that the party defendant has a sufficient compensation given to him by the costs which the law, as a matter of course and as of right, awards him. In that very case it is also laid down, that if a person has no cause of action at all, and yet maliciously sues the plaintiff, to the intent and so as to do him some special prejudice, an action lies. The same law is laid down in the earlier case of *Waterer v. Freeman* (b). But is the Court of Bankruptcy a legal tribunal? And is what has been done by the defendants, the taking a proceeding there, within the terms of the position I have laid down? In *Pim v. Wilson* (c) the Lord Chancellor assimilates the proceeding in question to an action at law, as both being "remedies for the recovery of a debt." And in *Farley v. Dawks* (d) it was assumed as clearly actionable for a person, maliciously and without probable cause, to file a petition for adjudication of bankruptcy against a person, and to cause him to be declared a bankrupt. But it has been argued that no special damage is averred to have resulted to the plaintiff from the defendants' malicious and groundless proceedings. That, I think, is fully answered by the two cases of *Craig v. Hassell* (e) and *Churchill v. Siggers* (f). In the former case the declaration averred that the defendant had maliciously and without probable cause filed an *affidavit of danger* in the Court of Exchequer, and thereby caused an extent to issue against the plaintiff as a crown debtor; under which his goods were seized and detained until the extent was superseded; and the said extent was then and is ended; covering damage from being deprived of the use of his goods; being disabled from discharging his debts; being injured in his credit with certain persons named, and others; and being put to costs, &c. This was

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(a) 1 Salk. 13.

(b) Hob. 205, 266

(c) 2 Ph. Ch. Cas. 653, 656.

(d) 4 Ell. & Bl. 493.

(e) 4 Q. B. 481.

(f) 3 Ell. & Bl. 929.

H. T. 1864. held on demurrer to show a good cause of action. In *Churchill v. Queen's Bench Siggers* the averment of special injury was in almost the very same terms as are used by the pleader in the present case.

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Upon the whole then, I am of opinion that the authorities I have cited, based, as I believe them to be, on sound sense and good policy, fully sustain the plaintiff's proceeding at law to recover compensation for the injury he has sustained; the special damage has been sufficiently averred; and that the costs recoverable, which are merely at the discretion of the Judge in bankruptcy, are not, and ought not to be given as an adequate compensation for the injury here averred to have been sustained. I concur with the Court of Common Pleas, in *Chapman v. Pickersgill (a)*, where Pratt, C. J., says, that "wherever there is an injury done to a man's property by a false and malicious prosecution" (though that be "a proceeding in nature of a civil suit") "it is most reasonable he should have an action to repair himself." Accordingly, I am of opinion the demurrer ought to be overruled.

O'BRIEN, J.

I entertained some doubts as to this case during the argument, but on further consideration I have come to the conclusion, that the summons and plaint does not show a good cause of action, and that accordingly defendants' demurrer should be allowed. The first question appears to be, what is the nature and character of the proceedings taken by defendant, as stated in the summons and plaint, under the 105th and subsequent sections of the Irish Bankruptcy and Insolvency Act of 1857? And upon this question we have the authority of Lord Cottenham's opinion in the case of *Pim v. Wilson (b)*, with respect to nearly similar proceedings under the English statute, 1 & 2 Vic., c. 110, that they are to be regarded in the light of civil proceedings to recover a debt. It is true that the effect of such proceedings may be, that the trader against whom the debt is claimed would, by non-compliance with the provisions of the statute, be deemed to have committed an act of bankruptcy; but, as regards the question now before us, the proceedings stated

(a) 2 Wils. 145.

(b) 2 Ph. Ch. Rep. 656.

in the summons and plaint are essentially different from the suing out of a commission, or (according to the present practice) filing a petition in bankruptcy.

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The next question is, whether an action will lie for taking the proceeding complained of even though taken maliciously and without reasonable or probable cause, unless it be shown that some further damage has ensued from it besides what is stated in this summons and plaint. It appears to me that the general rule to be collected from the authorities on the subject is, that a party is not liable to an action for having brought a groundless *civil* action against another, though done maliciously and without reasonable or probable cause, except the party against whom such previous action was brought had sustained special damage thereby; and further, that the costs and expenses incurred by him in resisting such previous action do not constitute special damage for the purpose. The opinion expressed by Chief Justice Holt, in his judgment in *Savile v. Roberts* (a), is to this effect: he takes the distinction "between the suing of an action maliciously, and the indicting of a man maliciously;" and he refers to the fact, that in the former case the statutes gave costs to the party wrongfully sued, whereas in the latter case the party wrongfully indicted has no other remedy to reimburse himself for his costs, except by action. The rule is stated to the same effect in Buller's *Nisi Prius*, Ch., 2, p. 11, &c.; and I do not think that a contrary doctrine is established by any of the cases on which plaintiff's Counsel have relied. By reference to those in which such an action as the present was held maintainable, it will be found that some *legal* damage was actually sustained by the party in consequence of the previous proceedings complained of, besides the costs and expenses which he had incurred in defending them. For instance, in the case of *Craig v. Hassell* (b) the declaration, after stating that the defendant falsely and maliciously, &c., had procured a writ of extent to be issued against the plaintiff for a sum much exceeding what was due; and that, under said writ, plaintiff's goods were seized and detained for a considerable time, and that plaintiff's credit was injured by such proceedings, further

(a) 1 Lord Ray. 378 to 380.
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(b) 4 Q. B. 481.
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stated, that in consequence thereof, some of plaintiff's creditors required immediate payment of their demands, which they would not otherwise have required; that one of them had sold plaintiff's property at an undervalue, and that another had proceeded to make him a bankrupt. In the present case, however, though there is a general allegation that plaintiff was greatly injured in his credit by the proceedings, there is no statement of any particular damage sustained by him therefrom. The other authorities cited for plaintiff have been so fully observed on during the argument, and in the judgment of my Brother FITZGERALD, that it is not requisite for me to refer to them in detail.

The case of *Cotterell v. Jones* (a) has been relied on by defendant's Counsel; and, though the actual decision in it may not be an authority for that now before us, the opinions expressed by the Judges appear to sustain defendants' argument upon the present demurrer. In page 719, Jervis, C. J., says:—"Where an *action* is "wrongfully brought, the costs which the party gets are a compensation for the wrong; but in criminal cases there are no costs." In page 729, Maule, J., states, as conceded, that the action "could not be maintained in respect of extra costs—that is, costs *ultra* the costs given by the statute to a successful defendant." And in page 725, that, "To hold it to be actionable to sue in the party's own name, would be rather too great an interference with the right to bring actions." And Williams, J. (page 730) says, "If there be malice, and want of reasonable or probable cause, no doubt the action will lie, provided there be also a *legal* damage." And his previous observation (in page 723) that the costs given in the former action "must be assumed to be a full compensation for the vexation," appears to show that in his opinion such costs did not constitute "*legal*" damage. Other observations will be found in the case to much the same effect.

Plaintiff's Counsel have also relied (as showing special damage) on the statement in the summons and plaint that plaintiff was obliged to attend in the Bankrupt Court, to the injury of his credit, and was prevented for several days from attending to his business;

(a) 11 C. B. 713.

but a similar observation would apply to the case of an ordinary action brought against a trader. The proceeding taken in the present case (whatever further proceedings might have been taken if it succeeded) was in itself only a claim of an alleged debt, and plaintiff appeared to resist it. There is no more discredit or imputation of insolvency in his doing so than there would be if an ordinary action had been brought against him, and resisted, on the ground that he did not owe the debt (an event of frequent occurrence in the case of traders); and if he resided in the country, and was sued in Dublin, he might also be obliged to absent himself from his business, in order to attend the trial, or to answer his professional advisers. It could not I think be contended that, in case the action against him was defeated, and shown to be unfounded, he could rely on those circumstances as constituting legal damage, and entitling him to bring a subsequent action against the party who had wrongfully sued him; and I see no reason why we should give them more effect in the present case.

I concur in the other reasons assigned by my Brother FITZGERALD, and am accordingly of opinion (as I have already stated) that defendant's demurrer should be allowed.

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May 6, 7.
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A certain road was vested in the Commissioners of Inland Navigation, up to the passing of the 11 & 12 G. 3 (*Ir.*), c. 31. That Act constituted the Grand Canal Co., and transferred the property in said road to the said Co.; said road never was the subject of a grand jury presentment. The Grand Canal Co. levied tolls from the public using the road.

Held, by O'BRIEN and HAYES, JJ.—*dissentientibus* LEFROY, C. J. and FITZGERALD, J.),—that, since the passing of the Rathmines Improvement Act incorporating the Towns Improvement Act, the liability to repair this road lay upon the Rathmines Commissioners.

Held also, by O'BRIEN and HAYES, JJ. (*dubitante* LEFROY, C. J., *dissentiente* FITZGERALD, J.), that the proper remedy to compel repair was by *mandamus*.

DEMURRER.—In Trinity Term, 1863, the Court granted a writ of *mandamus*, directed to the defendants, who were thereby commanded to “proceed to repair, or cause to be repaired, and put into good order and condition, a certain “public road and thoroughfare which runs along the south side of the Grand Canal, “from Latouche's Bridge to Clanbrassil Bridge, and in front of, and “close to the Portobello Barracks, and situate within the district “comprised in the Rathmines Improvement Act, 1847;” and to “do every Act necessary to be done in order to put the same road into “good condition and repair.”

To that writ the defendants, by their secretary, returned, first, that “the road in the said writ mentioned and described, or any part “thereof, is not, and before, or at, or during any of the said several “times in said writ in that behalf mentioned, never was a public “highway, as alleged in and by the annexed writ.”

The defendants further returned:—“That, *long prior to the “passing into law of each and every of the several statutes in “the annexed writ mentioned, or any of them, ever since the “passing into law of the statute of the 11 & 12 G. 3, c. 31, entitled “an Act for enabling certain persons to carry on and complete “the Grand Canal, and from thence hitherto continually, the said “roadway, and every part thereof, in the said writ mentioned, has “been and still is in sole and exclusive possession and enjoyment of “the said Grand Canal Company, or of their tenants or lessees; “and that the said road, and every part thereof, was, before and up*

“to the passing into law of the said last recited Act, vested in, and

“in possession and enjoyment of the Corporation for the promoting
 “and carrying on an Inland Navigation between the places, and as
 “in the said recited Act, mentioned and specified.”

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And further, “that, from and ever since the passing into law of
 “the said above recited Act, the said road and every part thereof,
 “and the soil, over, and upon and through which the said road and
 “each and every part thereof runs, is and always has been the sole
 “and exclusive property of said Grand Canal Company.”

And further, “that the said road and every part thereof is,
 “and from the time of the passing into law of said above recited
 “Act, has always been what is termed by said recited Act one
 “of the trackways made and running at the side of the canal of
 “said Company, and in the said recited Act mentioned and referred
 “to; and that said road or any part thereof was not, before or
 “at the time of the passing into law of said above recited Act,
 “a public highway, as alleged in said annexed writ; and long prior
 “to the passing into law of said above recited Acts in said annexed
 “writ mentioned, the said Grand Canal Company, in pursuance of
 “the provisions of the above recited Act, placed and erected across
 “the said roadway certain toll-bars and gates, and that they have
 “ever since, and under and by virtue of said above recited Act,
 “continued, by themselves or their lessees or tenants, to receive
 “tolls for the use of the said roadway, at the rates and in man-
 “ner as provided by the above recited Act.”

And further, “that, from and ever since the passing of the said
 “above recited Act, and until said roadway became out of repair, as
 “in said writ mentioned, same was always repaired and maintained
 “by the said Canal Company, or their servants or lessees thereof;
 “and that the said Canal Company were and are bound by law to
 “repair the said road.”

And further, “that no presentment was ever made by any grand
 “jury for the maintaining and repairing of said road or any part
 “thereof; and that no grand jury, by themselves or by their
 “surveyors, contractors or servants, at any time or times, ever
 “exercised any control or right over any portion of said roadway;

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And further, "*that no act was ever done, or suffered to be done, by the said Canal Company, or by any other person or persons, whereby they, the said Canal Company, in any way forfeited, or annulled, or otherwise varied their rights to said roadway, and in connection therewith, as vested in them by the said above recited Act.*"

And further, "*that said roadway or any part thereof, for the reasons aforesaid, never was, nor is, a public highway or roadway, within the meaning of any of the statutes in the annexed writ mentioned; and that the defendants have no power or authority in law entitling or requiring them to enter upon said highway or roadway, or any part thereof, for the purpose of repairing or maintaining same; and that, subject to the right of Her Majesty's troops to use said road, and of the public by paying the tolls as prescribed by the said above recited Act, said road, and each and every part thereof, is, and always from the passing of said above recited Act has been, and still is the sole and exclusive property of the said Canal Company, and that they alone have the power and authority and duty of repairing and maintaining, and are by law required to repair and maintain said way.*"

And for the causes aforesaid the defendants submitted that they had not the power, and that they could not and ought not, to repair, or cause to be repaired, or put into good order or condition, the said road or any part thereof, as by the said annexed writ they were commanded.

Second plea:—And as to so much of said return wherein it is alleged that, long prior to the passing into law of each and every of the several statutes in the said writ mentioned, or any of them, and ever since the passing into law of the statute of the 11 & 12 G. 3, c. 31, entitled, &c., and from thence up to the present time of making the said return, the said roadway and every part thereof in said writ mentioned has been, and then was, in the sole and exclusive possession and enjoyment of the said Grand Canal Company, or of their tenants or lessees;—the said Attorney-General, yet for plea

thereto says, that said roadway was not at the time of the passing of the said Rathmines Improvement Act, 1847, nor is same now in the sole or exclusive possession of the Grand Canal Company, or of their tenants or lessees; but, on the contrary, at the time of the passing of said Rathmines Improvement Act, was and now is a public highway, with a turnpike or toll-gate thereon, for the use of all persons with carriages, carts, and horses, to pass and repass thereon, paying a certain toll fixed by law: and this the Attorney-General prays may be inquired of by the country.

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Third plea:—And as to so much of said return wherein it is alleged that no act was done or suffered to be done by the said Canal Company, or by any other person, whereby the said Canal Company forfeited, or annulled, or otherwise varied their right to said roadway; and that the said roadway or any part thereof, for the reasons in said return mentioned, never was, nor then was, a public highway or roadway, within the meaning of the statutes in said writ mentioned,—the Attorney-General, by way of plea thereto, says, that the said Grand Canal Company, in pursuance of the statute of the 11 & 12 G. 3, in the said writ mentioned, heretofore, that is to say, on the 1st of January in the year of our Lord 1800, did erect a certain turnpike or toll-gate across the said road, the same being a trackway running along the side of the said canal; and the said road has been since that time continually used by the public as a public highway, road and highway, to wit, for sixty-three years last past, and has been during that period open to all persons paying a certain reasonable toll fixed by the law; and the said Attorney-General says, that the said Grand Canal Company did *thereby* annul or vary the said alleged sole and exclusive right to the said road, and did *thereby* dedicate the same to the public, subject to the said tolls; and that the same was, at the time of the passing of the said Rathmines Improvement Act, a public highway, within the meaning of that Act; and this the said Attorney-General is ready to verify.

To the second plea the defendants demurred.

Joinder in demurrer.

Replication to the third plea:—That the said turnpike and

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toll-gate, so erected across the said road by the said Grand Canal Company, was so erected by the said Company across the said road under and in pursuance of the provisions of the statute in said return mentioned, and not otherwise; and that said turnpike and toll-gate so erected hath always from thence hitherto, and still is so continued, erected and being across the said road, by the said Company, in pursuance of the said powers so vested in them for such purpose by their said recited Act as aforesaid, and not otherwise.

And further, that the use of the said road by the public during the period, as in said plea mentioned, was a user by them of said road, under the circumstances in said return mentioned; and same was so used by said public in pursuance of, and in conformity with, the provisions of said recited Act in said return and plea mentioned, and not otherwise; and that said road was during all said period only open to the public or to any person paying a certain reasonable toll fixed or allowed by law, to wit, the tolls as prescribed or allowed by said recited Act in said return and plea respectively mentioned and referred to.

And further, that the said tolls so paid and payable by the public, or by the said persons so using said road, were, during all said period, and still are, lawfully payable and receivable by the said Grand Canal Company, and same have in fact always been so paid and received by said Company solely under and by virtue of the powers vested in them by the said recited Act, in the said return and plea mentioned and referred to, and not otherwise; and same are and always have been, and still are, kept and retained by the said Company, and applied by them for the purposes and in the manner as by their Act directed and authorised.

And further, that the said Grand Canal Company did not thereby annul or vary their said sole and exclusive right to the said road, and did not thereby or at all dedicate the same to the public, subject to the said tolls or otherwise, or at all; and that said road or any part thereof was not, at the time of the passing of the said Rathmines Improvement Act, or at any time since, nor is same now, a public highway, within the meaning of that Act; and this the said

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Rejoinder to the replication to the third plea:—That the said Grand Canal Company did, at the time and in manner and form as in the same plea mentioned, dedicate the said road therein mentioned to the public, subject to the payment of the tolls as therein mentioned; and that the said road was, at the time of the passing of the said Rathmines Improvement Act, a public highway, within the meaning of that Act: and this the said Attorney-General prays may be inquired of by the country.

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To this rejoinder the defendants demurred.

Joinder in demurrer.

The points of demurrer noted for argument were very numerous; but the substantial questions discussed will be found at the beginning of the argument.

Jellett (with him *Macdonogh* and *Sidney*), for the defendants.

There are three main questions raised in this case:—First, whether the particular roadway mentioned in the writ and return, and admitted to form a trackway along the south bank of the Grand Canal, can be considered to be, in any sense of the phrase, a “public highway;” and, if it can, whether it is a public highway within the meaning of the 10 & 11 *Vic.*, c. 34, and the 10 & 11 *Vic.* (Loc. and Per.), c. 253, such as the defendants are bound to keep in repair.

If the Court shall be of opinion that the defendants are bound to keep this roadway in repair, a second class of questions, touching the structure of the pleadings filed by the Crown, will then arise.

The last question will be, whether the remedy by writ of *mandamus* can be at all applied to a case of this description.

At Common Law there are only four modes in which a public highway can be made; or at least by which its incidents can be acquired: first, by prescription; secondly, by dedication; thirdly, by Act of Parliament; and fourthly, by necessity. In this case the first and fourth modes are out of the question; so that this trackway, if it be a public highway, must have been created so by Act of

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Parliament, or become so by its dedication to the use of the public by the owners of the soil, followed by acceptance on the part of the public. The trackway was formed by the Grand Canal Company, in pursuance of powers given to them by the 11 & 12 G. 3 (*Ir.*), c. 31. If the Legislature intends that a private road which is private property shall become a public highway, that intention must be expressly declared by the Act: *The King v. The Inhabitants of Netherthong* (a). Now, the 11 & 12 G. 3 (*Ir.*), c. 31, was a private Act, passed for the benefit and profit of a private Company; and therefore this trackway was not made a public highway by section 33, which merely empowered the Company to erect on it turnpikes, and to take tolls from the public whom they permitted to use their private property. The Company only availed themselves of these powers in order to obtain an additional profit from their own property: it was not imperative on them to give this privilege to the public. That view is corroborated by section 34, which provides that "no road, which is now public, shall be thereby" (*i. e.*, by the turnpike), "obstructed,"—a provision quite inconsistent with the trackway being a public highway. The 35th section, too, enacts that the tolls shall be brought into the revenue of the Company and paid to the shareholders, instead of being devoted to the repair of the trackway. The result is, that this trackway was not made by that statute a public highway. Neither was it dedicated to the use of the public by the owner of the soil. It is necessary that there must be, on the part of the owner, an intention to dedicate, and also something equivalent to an adoption by the public, or on their behalf by those who represent them, of the dedication so made. The cases further establish that, if the user of it by the public is referable, not to the purpose of dedicating it to the public, but to the purpose of establishing some particular object on the part of him who dedicates it, or for any other purpose, that dedication made *alio intuitu* does not make it a public highway: *Barraclough v. Johnson* (b); *The King v. Richards* (c). The averments in the second plea to the return

(a) 2 B. & Ald. 179.

(b) 8 Ad. & El. 99.

(c) 8 Term Rep. 634.

show that there was no dedication of this trackway to the public within the rule laid down in these cases; but there arises the question whether the trackway is such a road as comes within the 10 & 11 Vic. c. 34, and the 10 & 11 Vic. (Loc. & Per.), c. 253. That last Act had for one of its objects to give to the Commissioners the control of those roads, and of those roads only, which had up to that time been under the control of the Grand Jury of the county—(sections 28 and 29). This Act must receive the construction given by Lord Eldon in *Blakemore v. The Glanmorganshire Canal Navigation* (a), his Lordship said (b):—"When I look upon these Acts of Parliament, I regard them all in the light of contracts made by the Legislature, on behalf of every person interested in anything to be done under them;"—and the Corporation of Dublin, the grand jury of the county of Dublin, and the Towns Improvement Commissioners of Rathmines, were the parties to the contract. This view is further carried out by the 25 Vic. (Loc. & Per.), c. 25, ss. 24 and 25. From the 6 & 7 W. 4, c. 116, ss. 64 and 65, and the 7 & 8 Vic., c. 106, ss. 62 and 65, it appears that the obligation to keep turnpike roads in repair was not thrown upon the grand jury of the county of Dublin. But under the 11 & 12 G. 3 (Ir.), c. 31, this trackway is either a turnpike road, over which the grand jury had not at the time of the transfer the power of repairing, or else it is a private road belonging to the Grand Canal Company; in either case it was not one of the public highways which the 10 & 11 Vic. (Loc. & Per.), c. 253, transferred to the defendants.

Secondly; the pleadings cannot be upheld in their present shape. The second plea has selected a particular passage in the return, and justified it. But the return is entire, and cannot be split; and the general rule is, that where a count, or a plea, consists of one entire allegation, putting forward the party's rights, and asserting that the allegation contains the grounds upon which the count or plea is to be maintained, the whole pleading must be taken as one thing, entire and indivisible; and the defendant or plaintiff, as the case may be, cannot say that a particular portion of his opponent's allegation is unfounded; unless it happens that a traverse of that particular portion leaves the remainder no excuse for the act done. Of

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(a) 1 Myl. & R. 154.

(b) Page 162.

E. T. 1864. course, if the Crown can show that, once the passage justified
Queen's Bench in the second plea has been withdrawn from the return, the
 THE QUEEN remaining facts stated therein are no answer to the writ, then
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 RATHMINES this objection must fail. But the remainder of the return shows
 COMMES. that the defendants have no control over this trackway, which
 still is the property and in the sole possession of a private
 Company; and therefore that is a good return, within the
 authorities I have cited, because it shows that the defendants have
 no control over the subject-matter in question. Furthermore,
 this plea undertakes to answer the *whole* of the return, but does
 not. Its introductory part undertakes to cover all the time inter-
 mediate between the passing of the 11 & 12 G. 3 (*Ir.*), c. 31, and
 the date of the return, and then covers only the interval between
 the 22nd of July 1847, and the date of the return.

Thirdly; the writ of *mandamus* is not the appropriate remedy
 in this case: the true remedy is by indictment: 10 & 11 *Vic.*,
 c. 34, s. 49; *The Queen v. The Trustees of the Oxford and*
Witney Turnpike Roads (a).

The *Solicitor-General* (J. A. Lawson), *Sergeant Sullivan*, and
Griffith, contra.

It was necessary in the second plea to traverse the allegation in
 the return, that the road was in the sole and exclusive possession of
 the Canal Company. To leave that allegation untraversed would
 be to admit it; and such an admission would be inconsistent with
 the allegation in the writ, that this road is a public highway, for it
 would be an admission that the Company can exclude the public
 whenever they like. The question to be decided is:—What was the
 condition of this road at the time of the passing of the 10 & 11 *Vic.*
 (Loc. & Per.), c. 253? for that Act imposed on the defendants the
 duty of keeping in repair whatever had previously been a public
 road.—[HAYES, J. But the plea leaves uncovered all the space
 of time between the passing of that Act, and the date of the
 return.]—It was not necessary for the plea to cover the interval,
 inasmuch as, if the road was in 1847 a public road, its character

(a) 12 Ad. & EL 427; S. C., 4 Per. & Dav. 154.

could not have been afterwards changed except by statute; and it lies on the defendants to show that such a change had taken place.

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This road is a public highway which the defendants are bound to repair: 11 & 12 *G. 3 (Ir.)*, c. 31: though it may be that the Canal Company also is bound to repair it. Any one who tenders the legal toll has a *right* to pass along a road on which a toll-gate has been placed in virtue of an Act. The corollary from the Act is that, as under it the Company acquired certain privileges and rights, they should give corresponding ones to the public. The statute constituted this a public highway, subject to a power in the Canal Company to levy tolls from those who use it.—[FITZGERALD, J. Assuming that to be so, does there not spring from the statute an obligation *on the Canal Company* to keep the road in repair?—Yes.—[FITZGERALD, J. That will raise the important question, whether the Towns Improvement Act (10 & 11 *Vic.*, c. 34) applies to this case at all?—Certainly: and when the Crown has compelled the defendants to repair the road, they can compel the Canal Company to apply to its reparation the funds in their hands. The 10 & 11 *Vic.* (Loc. & Per.), c. 253, s. 4, incorporated the 10 & 11 *Vic.*, c. 34; of which section 3 defines “street” to include “*any* road, square, court, alley, and thoroughfare within the limits of the special Act,” within which the road in question is situated; and section 49 makes the defendants guilty of a misdemeanour “for refusing or neglecting to repair any public highway within” those limits, and makes them liable to be indicted in the same manner as the inhabitants had been previously liable. Section 51 gives the defendants all the necessary powers over the road. The cases collected in the notes to *Dovaston v. Payne* (a) show that there has been a dedication to the public of this road, as they have a right to use it on payment of tolls. The erection of the toll-bar does not destroy the obligation of the inhabitants of the district to repair this road: *Rex v. The Inhabitants of St. George* (b); *The Queen v. The Inhabitants of Lordsmere* (c); *Sutcliffe v. Greenwood* (d); *The King v. The*

(a) 2 Sm. Lead. Cas. 113 (ed. 1856); 5th ed., p. 124.

(b) 3 Camp. 222.

(c) 15 Q. B. 689.

(d) 8 Price, 535.

E. T. 1864. *Inhabitants of Netherthong* (a); *The King v. The Inhabitants of Oxfordshire* (b); *The Queen v. The Inhabitants of Brightside Bierlow* (c); *The Northern Bridge and Roads Co. v. The London and Southampton Railway Co.* (d); *The Grand Surrey Canal Co. v. Hall* (e). The 10 & 11 Vic. (Loc. & Per.), c. 253, s. 28, does not limit the duty of the defendants to the reparation of roads previously under the control of the grand jury. That Act was amended by the 25 Vic., c. 25, of which section 23 plainly applies to the road in question. It is a mistake to suppose that the grand jury had not power to repair turnpike roads: they had the largest powers to repair *every* public road, under the 6 & 7 W. 4, c. 116, s. 50; and those powers were not cut down by the subsequent sections (64 and 65); while the 7 & 8 Vic., c. 106, ss. 64 and 65, only exempt the grand jury from liability to repair turnpike roads which had been already repaired by the Commissioners of Public Works.

The remedy by *mandamus* is open to the Crown equally with that by indictment: *The Queen v. The Bristol Dock Company* (f). Indictment would have been, too, an insufficient remedy: *The King v. The Severn and Wye Railway Co.* (g); *The King v. The Commissioners of Dean Inclosure* (h). The only dictum to the contrary is in *The Queen v. The Trustees of the Oxford and Witney Turnpike Roads* (i). But there the proceeding was taken against the parties who were only secondarily liable. The Court must decide according to the strict words of the statute: *Miller v. Salomons* (k).

Macdonogh, in reply.

A better rule of construction is laid down in *The London and Blackwall Railway Co. v. The Board of Works for the Limehouse District* (l). A writ of *mandamus* never lay at Common

(a) 2 B. & Ald. 179.

(c) 13 Q. B. 933.

(e) 1 M. & Gr. 392.

(g) 2 B. & Ald. 646.

(i) 12 Ad. & El. 427.

(b) 4 B. & Cr. 194.

(d) 6 Mee. & W. 428.

(f) 2 Q. B. 64.

(h) 2 M. & Sel. 80.

(k) 7 Exch. 559.

(l) 3 K. & J. 123.

Law for the non-repair of a road. In *The King v. The Severn and Wye Railway Co.* (a) the remedy by indictment was not available, for it could not have forced the Company to "reinstate" the road; and the same principle—that the *mandamus* may be obtained as a remedy when indictment is less convenient—formed the ground of the decision in *The King v. The Commissioners of Dean Inclosure* (b). But there is not any decision which derogates from that in *The Queen v. The Trustees of the Oxford and Witney Turnpike Roads* (c), that *mandamus* is not the remedy for the non-repair of a road: 5 *Petersdorff's Law of Roads*, p. 43, note; *The Queen v. The Inhabitants of Upton St. Leonards* (d); *The Queen v. Arnould* (e); *Tap. on Mandamus*, p. 113; *The Queen v. Powell* (f); *Rex. v. Robinson* (g).

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It does not follow that a road is a public highway because there happens to be a turnpike upon it. This turnpike simply exists under a permissive statute; and the public have no permanent right to pass along it contrary to the will of the Canal Company, who might close it up if they pleased: 3 *G. 4*, c. 126, s. 88; *The King v. Winter* (h). There is not evidence to show that the trackway in question is a public highway: *The King v. The Inhabitants of Leake* (i). It is impossible to construe many provisions of the 10 & 11 *Vic.*, c. 34, so as to apply them to this country. For instance, section 47 vests in the Commissioners all the materials, &c., provided by "the surveyors of highways;" while section 48 vests in them such powers, and makes them subject to such liabilities, "as any surveyors of highways are invested with or subject to by virtue of the laws for the time being in force:" but there is not in Ireland any body of officers called "surveyors of highways," so that the 10 & 11 *Vic.*, c. 34, cannot be wholly incorporated with the 10 & 11 *Vic.* (Loc. & Per.), c. 253. It is manifest that the Canal Company are bound to repair a trackway

(a) 2 B. & Ald. 646.

(b) 2 M. & Sel. 80.

(c) 12 Ad. & El. 427.

(d) 10 Q. B. 827.

(e) 8 El. & Bl. 550.

(f) 1 Q. B. 352; S. C. 4 Per. & Dav. 719.

(g) 2 Burr. 803.

(h) 8 B. & Cr. 792.

(i) 5 B. & Ad. 469.

E. T. 1864. which has been in use for ninety years, and yet never repaired
Queen's Bench by any public body, or even presented for by the grand jury.
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FITZGERALD, J.

T. T. 1864. In this case the question which we have to decide arises upon
June 23. the return to a writ of *mandamus*, and upon the subsequent pleadings. I shall advert only very shortly to the writ, because I shall hereafter have to cite at large the Acts of Parliament which are recited in it.

After stating certain facts, which, it alleges, cast upon the Rathmines Commissioners a duty to keep in repair a road which runs along the bank of the Grand Canal, the writ contains the ordinary mandate directing the Commissioners to "proceed to repair, or cause to be repaired and put into good order and condition," a certain "public road and thoroughfare which runs along the south side of the Grand Canal from Latouche's-bridge to Clanbrassil-bridge, and in front of and close to the Portobello Barracks, and situate within the district comprised in the Rathmines Improvement Act, 1847;" and to "do every act necessary to be done in order to put the same road into good condition and repair."

In their return to the writ, the Commissioners say, first, that—"The road in the said writ mentioned and described, or any part thereof, is not, and, before, or at, or during any of the said several times in said writ in that behalf mentioned, never was a public highway, as alleged in and by the said annexed writ."

Stopping at that point, there is a full and complete return to the writ; and, independently of the effect of the pleadings, every question of law and fact might, if the facts had been questioned, have been raised upon that simple return. But, probably with a view to raise the question of law, the return then proceeds to state a number of matters, which argumentatively amount to the same proposition, namely, that the road in question is not a *public* road which these Commissioners are bound to repair. The statement is—"That, long prior to the passing into law of each and every of the several statutes in the annexed writ mentioned, or any of them, ever since

"the passing into law of the statute of the 11 & 12 *G.* 3, c. 31, entitled an Act for enabling certain persons to carry on and complete the Grand Canal, and from thence hitherto continually, the said roadway and every part thereof in the said writ mentioned has been and still is in the sole and exclusive possession and enjoyment of the said Grand Canal Company, or of their tenants or lessees; and that the said road and every part thereof was, before and up to the passing into law of the said last recited Act, vested in and in possession and enjoyment of the Corporation for the promoting and carrying on an Inland Navigation between the places and as in the said recited Act mentioned and specified."

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I do not profess to deal further with the pleadings, which are in a very complicated state. But, as I have observed, either in the return itself or in the pleadings, all the facts necessary to our decision are conceded. There is no fact in controversy; and I make out from these pleadings the two questions of law; first—and I take these questions independently of the pleadings,—is the road in question a street or public road, within the meaning of the 10 & 11 *Vic.*, c. 34, which the defendants are bound to keep in repair? And, secondly, is the remedy by writ of *mandamus* applicable?

Before the passing of the 11 & 12 *G.* 3 (*Ir.*), c. 31, the road in question was the property of the Commissioners of Inland Navigation. Under the 11 & 12 *G.* 3 (*Ir.*), c. 31, which constituted the Grand Canal Company to be a company of carriers for trading purposes, the property theretofore vested in the Commissioners of Inland Navigation were transferred to the Grand Canal Company.

The other facts confessed upon both sides are, that, subsequent to the passing of the 11 & 12 *G.* 3 (*Ir.*), c. 31, the Grand Canal Company, in pursuance of the powers given to it by that Act, erected a toll-bar across this trackway; and, from that day down to the present, the public have enjoyed the privilege of passing along that trackway, and using it for all their purposes, with carriages, carts and horses, upon paying a toll; but that since the passing of that Act the road has remained vested in the Grand Canal Company, and has been in the sole and exclusive possession during all that time of themselves or their tenants and lessees. It is furthermore

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admitted that this is a road which has not ever been subject to the grand jury presentments.

The special Act for the Improvement of Rathmines is the 10 & 11 *Vic.* (Loc. and Per.), c. 253: two of its sections have been referred to. The 4th section provides "That the several Acts of Parliament following (that is to say), "'The Commissioners Clauses Act, 1847,' "and 'The Towns Improvement Clauses Act, 1847,' shall (save so "far as they are expressly varied or excepted by, or are inconsistent "with, this Act) be incorporated with and form part of this Act, and "shall be applicable to the works hereby authorised to be carried "on." With respect to this Act, I may say generally that, in erecting the township of Rathmines, and giving it a governing body, for the purposes of that government, the general intention of the Act, as to works or roads within the district of Rathmines, was to place the Commissioners, on the one hand, in the same position as the grand jury had been in, and to transfer the powers of the latter to the former; and, on the other hand, the district was, for certain purposes, exempted from taxation by the grand jury.

The first question mainly turns upon the 10 & 11 *Vic.*, c 34; in the interpretation of which some difficulty arises from the attempt made—which, when made, always leads to embarrassment—to provide in one and the same Act for two countries having totally different institutions.

The general "Towns Improvement Clauses Act, 1847," providing general powers for the improvement of towns, is made applicable to England and Ireland; and the 5th section provides for its incorporation with any special Act to be hereafter passed. The general Act contains no interpretation clause, but only a glossary, which enacts that "the word 'street' shall extend to and include any "road, square, court, alley, and thoroughfare, within the limits of the "special Act." I advert specially to this, that the word "street," which is used throughout the Act, is used to include "road," and "the thoroughfare," as well as "street," properly so called; and then I find that, by section 47, "the management of all the streets "which at the passing of the special Act are, or which thereafter "become, public highways, and the pavements and other materials,

“as well in the footways as carriageways, of such streets, and all buildings, materials, implements, and other things provided for the purposes of the said highways, by the *surveyors* of highways, or by the Commissioners, shall belong to the Commissioners.” We have not in this country any body at all corresponding to the English “surveyors of highways.” Along with the management of the streets, there was also transferred to the Commissioners “the pavements and other materials, as well in the footways as carriageways, of such streets, and all buildings, materials, implements, and other things, provided for the purposes of the said highways by the surveyors of highways, or by the Commissioners:” and by section 48 “the Commissioners, and none other, shall be the surveyors of all highways within the limits of the special Act, and within those limits shall have all such powers and authorities, and be subject to all such liabilities, as any surveyors of highways are invested with or subject to by virtue of the laws for the time being in force.” Again, I observe upon this section that, as applied to Ireland, I do not know its meaning, or how to define the powers to be exercised by the Commissioners of Rathmines—the powers given to them being “the powers and authorities” which “any surveyors of highways are invested with . . . by virtue of the laws for the time being in force,” there being no such body as “surveyors of highways” in existence in this country, and no laws, that I am aware of, applicable to Ireland, vesting in them any powers whatever. By section 49 it is enacted that “the Commissioners shall be deemed guilty of a misdemeanour for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanour, in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act.”

That section in substance makes them liable “for refusing or neglecting to” put in force the powers which the surveyors of highways have under the laws for the time being in force.

Again, with respect to this section, I advert to the circumstance that the misdemeanour is a neglect or refusal to exercise the powers

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of surveyors of highways—such powers as those surveyors, if there were any in existence, could have exercised within this district,—and that the Commissioners may be indicted for such misdemeanour in the same manner as the inhabitants of the township might, before the passing of the special Act, have been indicted. These provisions are wholly inapplicable to this country, there being no such laws in force in this country; and I really do not know how this liability is to be carried out, if it is imposed on the Commissioners of Rathmines.

The 50th section enacts that “The trustees of any turnpike road shall not collect any toll on any road within the limits of the “special Act, or lay out any money thereon.” This section was not much adverted to in the course of the argument; but appears to me to have an important bearing on the question, because whilst on the one hand it deals with ordinary turnpike roads and the trustees thereof, who generally act under statutes for public purposes and for the public benefit, it on the other hand leaves wholly untouched the case of a company who are not trustees of a turnpike road, but are trustees of a trackway for the use of which they are entitled to take tolls and rates from the public. So that, whilst the 50th section deals with the case of public roads under the Turnpike Acts vested in trustees, and throws a light on the antecedent sections, it leaves wholly untouched the roads belonging to the Grand Canal Company constituted by the 11 & 12 *G. 3 (Ir.)*, c. 31. These are the limits of the powers of the defendants, and these the sections which, being incorporated by reference into the Rathmines special Act, it is necessary for me to advert to. But what overrides the whole is, that the “street” must have been at the time of the passing of the special Act a Queen’s public highway—nay more, I should infer that it must have been a Queen’s public highway, under circumstances such as would have bound the surveyors of highways to exercise their powers; and in respect of which the inhabitants of the district would have been liable to an indictment.

The Rathgar Special Act (25 *Vic. (Loc. & Per.)*, c. 25) was also recited in the writ of *mandamus*, but its provisions do not

carry the case further than it was carried by the antecedent Rathmines Act. It exempts the district from taxation by the grand jury, and transfers to the Commissioners under the Act the powers of the grand jury to make and maintain the roads within it.

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The question will really arise upon a construction of the 11 & 12 G. 3 (*Ir.*), c. 31, for the character of this road depends very much upon the provisions of that statute. That is the Act which enabled the present Grand Canal Company to carry on and complete the Grand Canal; section 16 vested in the new Company the property and powers of the Corporation for promoting and carrying on the Inland Navigation. It is not necessary to advert further to that section: I pass next to section 33. By the antecedent sections, this newly-constituted Company, though formed for certain definite purposes, is in its true character a trading company of undertakers authorised to carry on business to a certain extent as carriers by water, and enabled to apply to their own purposes the profits which they shall realise; and, accordingly, they are authorised to take certain navigation tolls and rates. But as they had other properties which might be turned to profitable account, independently of the mere navigation, this 33rd section provides, that "It shall and may be lawful for the said Company to erect one or more turnpikes upon and across any of the trackways which now are or shall be made upon either side of the said navigation." The road in question is one of the trackways on the south side of the canal.

The 33rd section goes on to authorise the Commissioners to "take and receive the following tolls, for which they may distrain and sell, as is usual at other turnpikes;" and these tolls when levied need not be devoted to any public purpose whatever, but are the private property of the Grand Canal Company. Under the 34th section, the "toll shall be paid only at one gate, and but once in any one day; and no road, which is now publick, shall be thereby obstructed." The meaning of that section is that, although these trackways run across certain ordinary public roads, no regulation of the Company shall be permitted to interfere with the right of public traffic on the public highways. But the Act itself takes the distinction between a public highway and the trackway in respect to

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the use of which the Company are entitled to take tolls for their own profit. From the pleadings, it appears that one of these trackways is the road in question, upon which the Company have erected toll-bars; and over which they have, from the date of the Act until now, permitted the public to traffic, but have subjected that use of it by the public during that entire time to the payment of tolls. They still have their toll-bars there, and take tolls; and, for all that appears on the pleadings, this road is still one of their trackways, used as such; the property in which and the right to use which is still vested in them by the 11 & 12 G. 3 (*Ir.*), c. 31; and I am not aware of any subsequent provision of any statute which authorises the inhabitants to take from the Company that trackway, or to interfere with it against their will. Now will be seen the important effect of the 50th section of the 10 & 11 Vic., c. 34, which provides that "The trustees of any turnpike road shall not collect any toll on "any road within the limits of the special Act, or lay out any "money thereon;" whilst that section, though incorporated with the Rathmines special Act, does not apply to the case of a Company who are not trustees of a turnpike road, but are owners of the road in respect of which they are entitled to take tolls, and have allowed the public to traffic upon it upon payment of these tolls.

Upon these Acts the question is, whether this trackway, or any portion of it, has become a Queen's public highway, so as to bring it within the meaning of the sections to which I have adverted in the 10 & 11 Vic., c. 34, so as to transfer the liability to repair it to the Commissioners of Rathmines; to authorise them to go upon this trackway and repair it as they think fit, and to do that at the expense of the township; while at the same time the Company retains its property in the road, and its right to take tolls from the public for the use of the road?

With respect to the duty of repairing it, although the road might be a public trust, still the common law liability of the parish to repair the road would exist, and might be enforced by writ of *mandamus* or indictment, notwithstanding that the trustees were entitled to take the tolls. There is only one authority to which I shall advert on that subject—*The Queen v. The Inhabitants of*

Lordsmere (a), in which a good deal of learning as to the general operation of the Turnpike Acts will be found. The question there was, whether the parish was bound to repair a road passing without its limits, which had been erected, within a period of about twenty years before by trustees of a turnpike trust still in force? The question was, whether that was a case in which the parish was bound to repair? It was said that, according to the Common Law, the parish was bound to repair every public highway, or so much of it as passed within its limits; and it was determined in the course of that case that, whether the highway was of ancient origin or had been recently created, once it became a Queen's public highway, in the ordinary sense of that word, the parish was bound to repair it, though it was of comparatively modern date; and Lord Campbell, in delivering judgment, said this:—"This objection really raises the whole question of merits; for if the township is liable at all, it can only be on the ground that the road was a common Queen's highway; and therefore, if the township is liable, the road is properly described"—(p. 696). Further on, the Chief Justice said:—"The defendant's Counsel were forced to admit, that if an ancient highway were turned into a turnpike, the imposition of tolls would not prevent its continuing to be repairable by the parish; but a distinction was made between an old and a new highway in that respect. But I am of opinion that the rule of law is, that the parish is liable to repair all highways, whether new or old. I concur in what is said on that subject by Abbott, C. J., in *Rex. v. Netherthong* (b):—"By the general rule of law, the inhabitants of any district who were liable to the repair of all the roads there, previously to the introduction of a new highway, are also liable to the repair of that highway." Where the new road has been made by private persons, dedication by the owner of the soil, and user by the public, and adoption by the parish, are, according to my opinion of the law, material circumstances, as proving that an irrevocable license to use the way has been given to the public, and as being evidence that the way is a public common highway: the liability of the parish to

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(a) 15 Q. B. 689.

(b) 2 B. & Ald. 179.

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"repair is a consequence of its being a public highway." The Chief Justice then goes on to comment on the case of *Rex. v. Mellor (a)*, where the period, during which the road was by Act of Parliament to be a highway, had expired. The Court had there determined that, upon the expiration of the period limited by the Act, the road ceased to be a public highway; and that the parish was not bound to repair it. But here the distinction has been taken that the road in question is a public highway, and that therefore the parish was liable.

From the authorities cited, I infer that, in reference to all roads in England, before any liability in the parish to repair them can arise, they must be roads either dedicated by private owners to the public use, and accepted by the public, on the other hand, as Queen's public highways; or, if created by statute (as many roads have been by trustee Acts) then there must be words or expressions equivalent to create or make them Queen's public highways. And as to the imposition of tolls, it appeared to me during the argument, that that could scarcely make any difference as to the true character of roads once they have become public highways. It is true that there are trustees to maintain the highway, and that the tolls are an additional fund to maintain it: but they do not supersede the general liability of the parish to maintain all the roads within the parish; and therefore it will be found that in cases under the Turnpike Acts in England there is no analogy to the present.

It remains to be considered then, does this road come within the meaning of the General Towns Improvement Act? Has this part of the trackway become a Queen's public highway? My opinion, formed on the best consideration that I can give to the case, is that this is not a public highway, within that sense and meaning which would transfer it, in the manner described by the Act, to the Towns Commissioners of Rathmines. I understand that there is an issue joined as to the true character of this road. We, however, can only deal with the facts as spread upon the pleadings, and can deal with it here only as if we were a Court of Appeal. I rely upon these facts, so stated on the pleadings, as establishing this—that this

piece of road still is one of the trackways of the Canal, subject, in its whole extent, to be used by the Grand Canal Company—no matter what its extent is—as a trackway for the purposes of their navigation; and for all that I can see in the case, independently of private observation, it may, now or hereafter, be necessary for them to use the entire of this very trackway for the purposes of their trade; and it remains vested in them as their private property subject to any rights of passage over it which the public may have acquired in the meantime.

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But has there been any dedication of this road by the Grand Canal Company to the public, and an acceptance of it by the public? I can find none such. It is not a dedication to the public to say that, upon this trackway which we must maintain for the purposes of our Acts, we will give you a passage, if you, previous to using it, will pay us a toll. How have the Canal Company dedicated this road to the public in the out and out way which makes it a Queen's public highway, so that possession of the soil, and pavements, and other materials, remains in the defendants, and authorises them now, and would before the special Act have authorised, the surveyors of highways to enter on the road and alter its character so as to make it more convenient for the public traffic; or how have the Company taken out of themselves the property they had in the soil, and pavements, and other materials, so as to authorise the Commissioners to enter on it at their peril, and repair it?

Again I observe, what is there in the 11 & 12 G. 3, c. 31, to declare this to be a public highway? In the Act itself the distinction is pointedly taken between this trackway and a public road; and the Act provides that the Company, in erecting their toll-bars across this road, shall not interfere with the public in their use of the public roads intersecting it. There is nothing in the pleadings inconsistent with the possession which the Legislature gave the Company by the 11 & 12 G. 3, c. 31; or with the power to erect toll-bars, and there to take for their own purposes certain tolls. Of course, if the Company think fit to take the tolls, they will, one would suppose,

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It was said that there are houses abutting upon it, and that this circumstance has altered the character of the ground. But we cannot take notice of this. It was then said that this is not at all a trackway ; but that the true trackway ran immediately along the side of the canal, and that the rest of this road is a public highway. But that does not appear on the pleadings ; and we can only take into account the matters stated upon the pleadings. Upon the first question therefore my conclusion is, that this road, being a portion of the trackway of the canal, is not a Queen's common highway, within the meaning of the 10 & 11 Vic., c. 34, which declares that the word "street" shall include a public road or thoroughfare.

The second question is the one that was debated upon the motion to make absolute the conditional order—namely, as to whether the writ of *mandamus* lay in this case? On the part of the plaintiff it was said to be the proper remedy ; and certain authorities were referred to in which it appeared that the Court of Queen's Bench in England had granted writs of *mandamus* to compel the repair of public roads. On the other hand, authorities were cited as deciding that the Court of Queen's Bench in England could not grant a writ of *mandamus* to compel these Commissioners to repair a public road ; but would leave the parties to their remedy by indictment—one reason being, that the remedy by indictment was more convenient, and that the fine, which is part of the penalty under an indictment, would be expended in repairing the road. But the point that was discussed upon the conditional order was really whether, having regard to the fact that the liability, if any, being imposed on the Commissioners of Rathmines by the 10 & 11 Vic., c. 34, and it being declared, by the same Act and the same section which imposes the obligation, a misdemeanour to neglect or refuse to keep the road in repair ; and the remedy there given being by indictment, whether any other remedy could be maintained ; and in making the conditional order absolute, the Court expressly guarded itself against indicating any opinion upon this question. The Lord Chief Justice

expressly said that the object of the Court in making absolute the order was, to provide that the question might be raised more solemnly upon the return to the writ of *mandamus*, than could be done upon the interlocutory motion; and I, in making some observations, took care to expressly guard myself against pronouncing any opinion upon the main question; and at the same time added that, upon this very question, it was my impression that it was improvident to make absolute the conditional order, because indictment was the true remedy, and the writ of *mandamus* was not applicable. "In the present case," I said, "the remedy given by statute is by indictment; and where the same statute imposes an obligation, and either gives a remedy, or awards a punishment to enforce the duty, the remedy given by the Act of Parliament must be pursued. And I apprehend that the insertion of the remedy in the statute not alone affects our discretion in issuing the writ of *mandamus*, but *may* take away that discretion altogether. That appears to have been decided in *Rex v. Robinson* (a), where Lord Mansfield, C. J., laid down the law thus:—'The rule is *certain* that, where a statute creates a new offence, by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence, not antecedently unlawful, by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other; and this is the resolution in *Castle's case* (b).' The rule in *Castle's case* is distinctly applicable to, and supports Lord Mansfield's decision in *Rex v. Robinson*. The way in which I apply that case to the present is this:—The obligation to repair this trackway is solely the creature of statute; because it only exists under the statute; and in respect of the township which the defendants represent, there was no obligation to repair it before the special Act passed. The obligation, if it at all existed previously, was upon the county Dublin, acting through the grand jury: so that the same statute which created the obligation gave also the remedy; and the breach of the duty is made a misdemeanour, and the punishment should be by indictment,

(a) 2 Burr. 803.

(b) Cro. Jac. 643.

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and I put it—by indictment, *and not otherwise*. But it was said that to the Crown the Court would give leave to file an information. No doubt has ever been cast on the case of *Rex v. Robinson*, which has been repeatedly recognised in several cases, especially in the case of *The King v. Carlile (a)*; and, applying to this case the rule there laid down, it appears to me that, though this is a case of a writ of *mandamus* sought by the Attorney-General, that the statute takes away entirely the remedy of issuing a writ of *mandamus*, and that this question is open upon the return to the writ.

If therefore the Commissioners of Rathmines were at all liable to repair this road, the remedy should in my opinion have been by indictment, and not by writ of *mandamus*. I am further of opinion that the question is open to the Commissioners now, even though the order for the writ has been made absolute. Upon the two questions therefore I am of opinion that our judgment should be given for the defendants, on the grounds—first, that the road in question is not a Queen's public highway, within the meaning of the 10 & 11 *Vic.*, c. 34; and, secondly, that the remedy should be by indictment, and that this writ of *mandamus* issued improvidently.

HAYES, J.

Mr. *Jellet*, in his argument on opening the demurrer, has I think very correctly told us that the questions raised may be properly reducible to three—first, is the writ of *mandamus* properly applicable to a case of this description; or is the prosecutor to be left to his remedy by indictment? The second question is, as to the structure of the pleadings; and the last is, as to the road in question being a highway, and the liability of the defendants, as such, to repair it. I shall speak of them in their order.

First; is the writ of *mandamus* properly applicable to this case, or ought we to have left the party to proceed by indictment?

The 49th section of the Towns Improvement Clauses Act, 1847, which is incorporated with the Rathmines Improvement Act, 1847, enacts that the Commissioners shall be deemed guilty of a misdemeanour for refusing or neglecting to repair any public highway

(a) 3 B. & Ald. 161.

within the limits of the special Act ; and shall be liable to be indicted for such misdemeanour in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act. And it is contended, on the authority of *Rex v. Robinson* (a), that the remedy by indictment alone is applicable. But the answer to that I take to be short and simple. This is not the case of an offence created by a statute which, while creating the offence, also appoints a specific remedy. The offence of neglecting to repair a highway is an offence at Common Law ; and, whether it be a parish, or an individual, or body of individuals, that be liable to the repair, as soon as the liability is ascertained, that party may be indicted at Common Law for the non-repair. All that this statute has done is, to transfer to the Commissioners that liability which had previously vested on the parish, but which in Ireland, ever since the introduction of the grand jury system, has been usually discharged by the assistance of grand jury presentments.

The question then arises, can the remedy by *mandamus* be resorted to as a convenient and more efficacious and beneficial remedy than that by indictment ; and was the Court right in exercising its discretion by a grant of the writ in this case ? It purports to be granted on the prayer of the Attorney-General, acting on behalf of the Crown and Government. No case has been cited to us of such an application ; but, if we are to be governed by the analogy derived from applications by that officer for writs of *certiorari*, the exercise of the Court's discretion in his favour would be so much a matter of course, that I would say he might almost demand it as a matter of right, in all cases to which the writ in its nature would be found applicable.

The case most strongly relied on by the defendants is *The Queen v. The Trustees of the Oxford and Witney Turnpike Roads* (b). There, two parties had a controversy as to which of them was bound to repair a street in Oxford. Each wishing to cast it upon the other, one of them applied to the Queen's Bench for a *mandamus* ; and the Court refused it ; suggesting a more appropriate mode of

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(a) 2 Burr. 799, 804.

(b) 12 Ad. & Ell. 427.

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deciding the controversy, through the medium of an indictment. Although I do not altogether concur in some of the observations of Lord Denman, I think the decision was correct. The primary object of the writ is the enforcement of a duty; and it is an abuse of the writ to make it ancillary to a mere decision of the controversies between litigant parties, where it has not been shown that a greater public benefit would result from a decision in one way rather than in another.

The case now before us is very different. The public prosecutor alleges a duty and a liability in the defendants to repair the road: he suggests that the road has been allowed to go out of repair; and so the public duty has been violated and neglected; and he comes to this Court, not so much to punish the defendants for the neglect, as to compel them to remedy the public mischief occasioned by that neglect. I think that is quite within the sphere of the writ, and that this Court acted rightly in issuing it.

The next question raised by the defendants is, as to the structure of the pleadings that have been put in on the part of the Crown. The 79th section of the Common Law Procedure Act of 1856 enacts that the provisions of the Common Law Procedure Act of 1853, and of that Act, shall apply to the pleadings and proceedings upon a prerogative writ of *mandamus*. But this enactment seems to have been lost sight of by both parties; and the pleadings have gone on to a surrejoinder, without any permission to file them; this Court having never been applied to by either party. So, also, neither of the parties have availed themselves of the alterations in the course and forms of pleadings introduced by the Procedure Act. All has been done under the old system. Passing by those matters however, as mere irregularities, of which neither party is now at liberty to take advantage, let us look at the general drift of the return, and plea thereto. In the return, it is averred that the road never was a public highway. If this can be made out in fact, then "*cadit questio*," as to the liability of the defendants to repair. But not content with that, the defendants proceed to set forth several matters, some of them connected with each other, and others of them distinct and independent; but all intended to show, when put together, that the

road in question was not such a road as the defendants were bound or liable to repair. The return being in the nature of a pleading in excuse, for not obeying the exigency of the writ, the defendants are at liberty to set forth as many matters as they think proper, provided they are not inconsistent with each other. Immateriality or duplicity are no vital objections to a return; but uncertainty and inconsistency tend manifestly to create confusion and embarrassment, and are therefore not to be permitted. The defendant having set forth in his return as many several matters as he thinks will, when put together, sufficiently excuse him, the prosecutor is authorised, under the 19 *G. 2*, c. 12, s. 2, extended by the 9 & 10 *Vic.*, c. 113, s. 2, to plead to or traverse all or any of the material facts contained "within the return." He is not obliged to plead to the whole return; but may select such portions of it as he thinks material, and make them the subject of traverse or avoidance. Tried by this test, it does not appear to me that violence has been done to the rules of pleading on the part of the prosecutor; and I am therefore of opinion that the defendant's second objection fails. We are thus brought to the third question, and to consider the substantial matter raised on the return and pleadings, as to the defendant's liability to repair the road in question. By the 11 & 12 *G. 3*, c. 31, the Grand Canal Company were incorporated for the express purpose of carrying on, to its completion, a project which had been begun by the Corporation for promoting Inland Navigation in Ireland, but which was then still unfinished. From the 2 *G. 1*, c. 12 (A. D. 1715) the Legislature had been engaged in a great scheme for promoting internal communication between the different parts of Ireland, and for making the principal rivers navigable. Very large sums of money had from time to time been voted by Parliament, and placed at the disposal of the several bodies to whom the management of the project had been successively confided. But, as the difficulty and expenses of the undertaking seemed to increase with the progress made in it, it was resolved, in the year 1771, to have recourse to private enterprise; and, accordingly, for the completion of the Grand Canal, with its branches and works, a joint-stock company was formed and incorporated. By the 16th section of the

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11 & 12 G. 3, c. 31, all the property, real and personal, then vested in the Inland Navigation Commissioners for the Grand Canal project, and all moneys granted by Parliament for the same purpose, and then unexpended, were transferred to, and vested in the Grand Canal Company. Full powers were given for completing and maintaining the works—for purchasing and holding the requisite lands, and for drawing the necessary supplies of water from the Liffey and other adjacent rivers. As remuneration for the expenses thus to be incurred, power was given to the Company by the 27th section, to levy a toll on every passenger, and on every ton weight of goods carried in any vessel along the canal. By the 33rd section, the Company was authorised “to erect turnpikes across any of the “trackways which now are or shall be made on either side of “the navigation, and to take and receive tolls, for which they “may distrain and sell, as is usual at other turnpikes.” “Provided “always (section 34) that such toll shall be paid only at one gate, “and but once in any one day; and that no road which is now “public shall be thereby obstructed”—*i. e.*, as I apprehend, by the erection of any gate upon it. Section 35 enacts that “the “clear profits which shall arise to the Company from the several “duties hereby vested in them, or otherwise, or so much thereof “as shall be thought proper, shall be paid among the share- “holders.”

Before proceeding to consider the more recent legislation, it may be well to notice shortly the state of the statute law, as to turnpikes, and especially turnpikes on trackways, reference being made to it in the 33rd section.

In the year 1729 the first Turnpike-road Act was passed in Ireland. During the two years next following, separate Acts were passed for the erection of turnpikes on upwards of twenty different lines or districts of road. Those Acts are nearly all framed from the same precedent; and the consideration of one will serve for all. The Act begins with a recital that the particular highway or road is out of repair, and dangerous for travellers, and cannot, by the ordinary course appointed by law, be effectually mended and kept in

good repair. It then constitutes a board of trustees, who are authorised to levy tolls from passengers, in respect of horses, cattle, and carriages, and gives a power of distress and sale in case of refusal to pay the toll. The tolls are to be applied, first, in payment of the expenses of the Act, and of carrying it into execution; and then in repair of the particular road. The trustees are also authorised to borrow money at interest, on security of the tolls, for putting the road into a state of repair. Beyond all question, those Acts were passed for the repairs of roads which, at the time of their passing respectively, were common and public highways. By the 3 G. 3, c. 11, special provision was made in respect to the tolls on trackways of the Inland Navigation Corporation. The 5th section enacts that, in order to keep in repair the several track-roads now or hereafter to be made along any canal or navigation, by direction of the Corporation, the Corporation may cause turnpikes to be erected upon and across any track-road or other road on the banks of the canal or navigable river; and may, from time to time, appoint such tolls and duties as they shall think reasonable, to be there taken, before any horse, carriage, &c., not helping any vessel up or down the canal or river, shall be permitted to pass through. And all the tolls, after deducting the necessary charges of collection, shall be applied to repair and keep up the said road; and subject thereto, to such other use, for the benefit of the works, as the Corporation may think right. On refusal, the toll may be levied by distress and sale. Such was the state of the law previous to and at the time of the passing of the Grand Canal Act—at a time when those trackways were vested in a corporation, not for its own private benefit, but altogether for public purposes. There can be no reasonable doubt then, whether we consider the language of the statute I have just cited, or the nature and purposes of the imposts to be levied, that the track-road was regarded, and was in fact, one of the highways of the kingdom; that the toll thereby authorised to be taken was the grant of a public franchise for the public benefit; and that the erection of turnpikes was tolerated as an obstruction of the free passage along the highway, only by reason of the necessity for securing the payment of the toll, which was created to be the fund primarily

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T. T. 1864. applicable to the repair of the road. If I am right in this view, it follows as of necessity that the very track-road which we have in judgment before us was, at the time of the passing of the 11 & 12 *G. 3*, c. 31, a common public highway; for in the return it is alleged that the road in question "was, before and up to the passing into law of the 11 & 12 *G. 3*, vested in, and in the possession and enjoyment of the Corporation for promoting and carrying on an "Inland Navigation." It was not a road set out and made for the first time by the Grand Canal Company, when acting as a joint-stock company, and for their benefit, as a part of their commercial adventure. I find nothing in the 11 & 12 *G. 3* which goes to show that the property of the Inland Corporation was thereby vested in the Grand Canal Company otherwise than as the Inland Corporation had held it. There is nothing to show that these track-roads, which were public high-roads before the Act, were anything but public highways after the Act. It would require very precise and special legislation indeed to reduce the track-road from being a public highway to the condition of a private road, and to debar the public from the enjoyment of those rights and privileges formerly possessed and purchased by them, even to the extent of a footway; for, if this be a highway to that extent, to that extent it must also be repaired. But there is nothing in the Grand Canal Act which could be so construed. All is in harmony with the previous legislation, save so far as a change of the system of management necessitated a change of proceeding. Thus, by the 3 *G. 3*, c. 11, s. 5, it is provided that the tolls, after deducting the costs of collection, should be applied to the repairs of the road; and, if not wanted for that use, then to such other use for the benefit of the works undertaken, or to be undertaken, by the Corporation, as that body should think proper and convenient; while, by the Grand Canal Act, section 35, it is provided, that the *clear profits* which shall arise to the Company from the several duties thereby vested in them, or *otherwise*, or so much thereof as should be thought proper, should be paid among the shareholders. If we gave to the phrase "clear profits" the interpretation that it was such profit as remained after providing for the repair of

the road, all will be in perfect harmony with the previous legislation, so far as the public interests are concerned.

Even without the aid of the English authorities which have been cited to us, I would not hesitate, from the consideration of our Irish Statute Law, to conclude that the road in question was a public highway—that it had been made so by the dedication of the Inland Navigation Corporation; and that that had been since confirmed by the Grand Canal Company. Those authorities do, in my judgment, put the matter beyond all reasonable doubt.

But then it is averred in the return that this trackway had never been repaired by grand jury presentment; and the inference sought to be drawn is, that this being the ordinary course appointed by the Statute Law for the repairs of highways, and not being resorted to in the case of this trackway, therefore the trackway could not have been a highway. I apprehend that that is a *non sequitur*; but, before discussing the question, I would wish to say a word or two as to the jurisdiction of grand juries over turnpike roads.

At Common Law, the liability to keep in repair all the highways of the kingdom rested with the parishes in which those highways were respectively situated; and this continued in full force until the institution of the grand jury system, which I believe derives its origin from the 10 *Car.* 1, sess. 2, c. 26. Now, the end and object of that system was not to annul the common law principle, but virtually to supersede it, by providing a more effective means of repair, by and out of the county rates or grand jury cess, than could be obtained by any parochial effort. But even the turnpike roads, with their boards of trustees, and power of levying tolls, were not exempt from grand jury supervision. Accordingly, by the 19 & 20 *G.* 3, c. 50, whenever a turnpike road was found to be out of repair, the treasurer of the road might be summoned before the grand jury, and examined, touching the state of the road, the amount of money received from the tolls, and its application. If money should be found to be in the treasurer's hands, the grand jury was authorised to make a presentment that the treasurer should, within a limited time, cause the road to be repaired. And, again, by the General Grand Jury Act (36 *G.* 3, c. 55, s. 87), it is enacted that nothing in

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It is true that the Act 36 G. 3 is not generally applicable to the county of Dublin; but I nevertheless regard it as a strong legislative declaration to the effect that the making of a road a turnpike road does not exempt that road from grand jury supervision and presentment. But these grand jury powers, though unquestionably existing, will not be exercised, unless the bad and foundrous condition of the turnpike road shall call them forth; and in that state of things, it will be the duty of the grand jury to supply any defect which may exist in the trust funds, by presentment in aid from the county moneys.—See *Rex v. Netherthong* (a); *Rex v. Inhabitants of Oxfordshire* (b); *Regina v. Inhabitants of Mightside Bierlow* (c). The fact that the grand jury has never yet interfered, or been called on to interfere, may be sufficiently explained by the fact that the tolls have, until recently, been found sufficient for the purpose of reparation, but in nowise proves that the road was not under grand jury surveillance.

Such then being the state of the law at the time of the passing of the Rathmines Improvement Act, let us see what then took place. By the incorporation of the Towns Improvement Clauses Act, 1847, the management of all streets within the township, being highways, was, by section 47, transferred to the Commissioners; the inhabitants were exempted (section 48) from grand jury cess for the repair of any roads within the township; and the Commissioners (section 49) are declared to be guilty of a misdemeanour if they refuse or neglect to repair any public highway within the township. By section 80, the trustees of any turnpike road are forbidden to collect toll on any road within the township. In consideration of the township being made chargeable with the cost of making and maintaining the roads and other works which the Commissioners are authorised

(a) 2 B. & Ald. 179.

(b) 4 B. & Cr. 194.

(c) 13 Q. B. 933.

to maintain, it is enacted, by the 28th section of the Rathmines Act, that the district shall not be chargeable with the cost of making and maintaining other like works within the county or barony.

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By the Rathgar Act (25 *Vic.*, c. 25, Loc. and Per.), the Commissioners have still more sedulously secured to themselves the exclusive jurisdiction over all roads within the township; for, by the 23rd section, the Commissioners are to have the same authority, as to roads within the district, as by the Grand Jury Acts of the 6 & 7 *W.* 4, c. 116, and 7 & 8 *Vic.*, c. 106, are vested in the grand juries; and, by section 23, all authority of the grand juries, as to roads within the district, is absolutely annulled; and it is expressly ordered that all roads within the district shall be made and maintained by the Commissioners at the cost of the district.

Such then being the state of the Statute Law on the subject before us, I think little more is required than a calm consideration of it to lead us to a conclusion as to the invalidity of this return. A great number of authorities has been cited; but I do not intend to comment on them in detail. The law, as laid down in many of those cases, is such as might have been deduced from the statutes I have referred to, viz., that we must hold this road to be a highway; and that it is not the less a public highway because a turnpike has been erected upon it, and toll taken there: *Regina v. Inhabitants of Lordsmere (a)*. It is not necessary for us at present to decide whether, under the 50th section of the Towns Improvement Clauses Act, the collection of tolls at a gate within the township is now legal. But be that as it may, the duty which the Commissioners have taken upon themselves to perform is unaffected thereby; and that duty is, to repair this and all the other highways within the township.

I am opinion that judgment ought to be given for the Crown on this demurrer.

O'BRIEN, J.

It is not necessary for me to consider the various objections raised upon the complicated pleadings in this case, as it is admitted

(a) 15 Q. B. 689.

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that the decision of it depends substantially upon two questions—first, whether the Commissioners are bound to repair the road which is the subject-matter of dispute; and, secondly, whether the proper mode of compelling them to do so is by writ of *mandamus*. Upon both those questions, I concur in the conclusion at which my Brother HAYES has arrived, that our judgment should be for the Crown. As to the second question, I think that, even if we were now considering the application to make absolute the conditional order for a *mandamus*, we should hold that it was a proper case for granting the writ. It is contended for the Commissioners that, if they are bound under the General Towns Improvement Act of 1847 (incorporated with their special Act) to repair the road in question, they would be liable under the general Act to an indictment for not doing so; and that therefore the proceeding by *mandamus* should not be adopted, as another remedy is given by the statute which imposes the obligation. It appears to me that, having regard to some provisions of the Act (to which I shall presently refer), there would be a difficulty in holding that such indictment could be sustained. Supposing, however, that it could, the authorities mentioned in *Tapping on Mandamus*, pages 24 and 25, establish the principle that a writ of *mandamus* will be granted, though there be another remedy, if that other remedy be not equally convenient. In the present case, if the proceedings should terminate in judgment for the Crown, the result would be an order on the Commissioners to repair the road. But, in case of an indictment, the result of a conviction would be a fine on the Commissioners; and though the fine (if sufficient for the purpose) might be applied in the repairs, I do not think that such an indirect mode of attaining the required object would be as effectual or convenient as the writ of *mandamus*, or that, upon the ground of another remedy existing, we should refuse the writ, especially where the proceeding is taken not by a private individual or public body, but is taken by the Crown, for the purpose of compelling the Commissioners to discharge a duty alleged to be imposed on them by Act of Parliament, and in the discharge of which the public are interested. It is further to be observed that, as the case

before us now stands, the writ of *mandamus* has actually been issued; and that, accordingly, the objection of there being another remedy (even if well founded) should not have the same weight as it would have had upon the application for issuing the writ. The judgment of the Court of Queen's Bench in England, in *The Queen v. The Bristol Dock Company (a)*, is an authority to show, as well that the objection is not sustainable, and also that, even if it were, it should not be yielded to at this stage of the proceedings. In that case, upon the discussion of the pleadings on the return, the objection was raised that indictment, and not *mandamus*, was the proper remedy; but Lord Denman stated the opinion of the Court that, even if the objection did not come too late after the writ had issued, it was entitled to no weight. He further stated that those who obtained an Act of Parliament for executing great public works, were bound to fulfil the duties thereby thrown upon them, and might be called upon by the Court to do so; and that the fact of their breach of contract causing also a public nuisance, should not dispense with the necessity of a specific performance of the obligation contracted by them. In the case now before us, the Commissioners, by accepting the office, assumed to themselves the duties which the previous statutes imposed; and I am, accordingly, of opinion, that if the repair of the road under discussion was part of their duties, that the performance of that duty might be enforced by *mandamus*.

With respect to this other question (that of the obligation of the Commissioners to repair the road) I shall refer in the first instance to the General Towns Improvement Act of 1847, which is incorporated with the two special Acts for the Improvement of Rathmines and Rathgar. The 47th section of the general Act provides that the management of all the "*streets*," which were at the passing of the special Act, or might thereafter become, "*public highways*," and the pavements, materials, &c., of such streets, and all buildings, materials, &c., provided for the purposes of said highways, by the surveyors of highways or by the Commissioners, should belong to the Commissioners. By the third section of that Act, the word

(a) 2 Q. B. 64.

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"street" was defined as including any "*road, &c., or thoroughfare*" within the limits of the special Act. The 48th section substitutes the Commissioners for the *surveyors of highways* within the limits of the special Act, and gives the Commissioners, within those limits, the same powers, and subjects them to the same liabilities as the *surveyors of highways* previously had and were subjected to; and it also exempts the lands within those limits from all liability for any *highway rate, grand jury cess, or other payment* for making or repairing roads within the other parts of the "*parish, township, barony or place*" in which the district within those limits or any part thereof is situate. The 49th section then enacts, that the Commissioners shall be guilty of a misdemeanour for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanour, "*in the same manner as the inhabitants thereof, or*" "of any parish, township or other district therein were liable before the passing of the special Act." This general statute was intended to apply to all cases, as well in England as in Ireland, where it was incorporated with any special Act. Such a mode of Legislation is certainly inconvenient, because words and phrases are introduced into the general Act which are not applicable to the state of matters and law in Ireland. And the difficulty to which I have already referred, of sustaining an indictment against the Commissioners, for not repairing the road in question, would arise from the circumstance that, under the 49th section, the Commissioners are only liable to such an indictment in cases where the inhabitants of the district would have been previously liable to it; and it is admitted that no case can be found of such a proceeding having been adopted in Ireland against the inhabitants of the district. Mr. *Macdonogh*, for the Commissioners, further contends that some other provisions of the general Act, which are relied on for the Crown, are also inapplicable to Ireland, because they refer to the office of "*surveyors of highways*," which is unknown in Ireland, and to "*highway rates*," which do not exist here. But as this statute was intended for both countries, we should, I think, give effect to such of its provisions as are applicable to Ireland,

though others may be inapplicable; and there is, I think, no difficulty (although the office of "*surveyors of highways*," or the *highway rate*, does not exist here) in our holding that the provisions of the 47th and 48th sections are applicable to Ireland, so far as to vest in the Commissioners the management of all public highways within their district, and the pavements, materials, &c., and as to exempt the district from any liability to grand jury cess or other payments for repairing roads in other parts of the barony or place in which such district is situate. Counsel for the Commissioners, however, rely on the fact that, previous to the special Acts, the grand jury of the county of Dublin never presented for or interfered with this road; and they contend that, accordingly, under the special Acts, the Commissioners had no power or obligation with respect to this road. But this argument cannot, in my opinion, be sustained. It is true that the special Acts transfer to the Commissioners all the powers, &c., with respect to roads within their district, that the grand jury formerly had; but there is nothing in those special Acts to limit their powers to what the grand jury had; or to show that while the general Act would in turn give them the power, and impose on them the obligation, of repairing *all* public roads within their district, they still, under the special Acts, should only deal with those roads with which the grand jury formerly dealt.

The next question for consideration is, whether, having regard to the facts appearing on the pleadings with respect to this particular road, it is a public highway within the meaning of those provisions of the general Act, which impose upon the Commissioners the obligation of repairing all public highways within the limits of their district. It appears on the pleadings that the soil of the road had been part of the property of the Grand Canal Company, lying along the side of their Canal; and that the road itself was one of the "*trackways*," referred to in the Company's Act of the 11 & 12 G. 3, c. 31, made along the Canal; that, in pursuance of the provisions of that Act, the Company had, upwards of sixty years ago, erected a turnpike and toll-gate across the road; that the road has since been continually used by the public as a public turnpike road and highway, subject to a certain reasonable toll fixed by the Company and

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payable to them under said Act; that, until within the last few years, the road had been maintained and repaired by, and at the expense of, the Company; and also (as I have already stated) that the grand jury never interfered with or presented for the road. On this state of facts I am of opinion, that the road should be considered as being a public highway, which, within the meaning of; the Towns Improvement Act, the Commissioners are bound to repair.

The questions as to what constitutes a public highway, and as to the mode in which it might be created, are fully discussed in the note to *Doraston v. Payne* (a), where it is stated that "a highway is a passage which is open to all the King's subjects;" and also, "that every passage which is open *de jure* to all the King's subjects must be a highway;" and further, that a highway may be created either by express Legislative enactment, or by the dedication of a right of passage over it to the public by the owner of the land over which the highway extends; and that such dedications, though not made in express terms, would be presumed from an uninterrupted use by the public of the right of way claimed. With respect to the road in controversy, it appears to me that, under the Canal Company's Act of the 11 & 12 G. 3, c. 31, the public, as soon as the turnpike and toll-gate was erected, were entitled to use the road, subject to the payment of the toll, the amount of which was limited by the 33rd section of the Act, and further by that part of the 34th section which provides that such toll should be paid only at one gate, and but once in any one day. The amount of the toll, or the extent to which it should be levied, was not left to the option of the Company; and the case therefore differs even from that of a person making a road over his own property for the use only of himself and of those of the public who would pay, for using it, such amount of toll as he might demand. And it appears that the road in question has been used by the public, subject to that limited toll, ever since the erection of the toll-gate. Reference has been made to the subsequent part of the 34th section, which provides "that no road which is *now* public shall be thereby obstructed;" and this provision

(a) 2 Smith's Lead. Cas, 5th ed., p. 124.

has been relied on as taking a distinction between the *trackways* and public roads. It is, however, to be observed that this provision refers to roads which were *then* public; and it appears in no way inconsistent with the supposition that the trackways, though not being *then* public roads, would become so when the toll-gates were erected under the Act. It is not necessary for me to refer to other provisions of this and other statutes which have been already observed on by my Brother HAYES.

The erection of the toll-gate, and payment of the tolls to the Company, have been, however, relied on as showing that the road is not a public highway, but that the right of passage over it, and not merely the soil of the road, belongs to the Company: but, in my opinion, the judgment of the Court in *The Queen v. The Inhabitants of Lordsmere (a)*, to which we have been referred, clearly shows that the imposition of tolls upon those using a road does not prevent it from being a common public highway, whether the tolls were imposed at the time of originally making the road or subsequently thereto.

It has been also contended that the Canal Company, who receive the tolls, are primarily liable for the repairs of the road. That may be so; but it does not exonerate the Commissioners from their being answerable to the Crown for the performance of the duties imposed on them by statute, even though the Company may be also liable to have proceedings taken against them for the purpose of compelling them to apply the tolls in repairing the road.

On these several grounds I am of opinion (as I have already stated) that our judgment should be for the Crown.

LEFROY, C. J.

Upon the first question which presents itself for our determination in this case—"namely, whether *mandamus* lies," I rather concur with my Brother FITZGERALD, for the very purpose of leaving it an open question deserving further consideration than I have been able to give it. The inclination of my mind is to follow

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(a) 15 Q. B. 689.

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 But as cases have been cited in which the convenience of the
 THE QUEEN Crown has been suggested as a reason for proceeding by writ of
 v. mandamus rather than by indictment, or by preferring an infor-
 RATHMINES mation, I offer upon that part of the case no definite opinion.
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With respect to the other, and the main question, whether this was a 'public road, the duty of maintaining which is thrown upon the Commissioners of Rathmines,—if it be a public road, I can only say that, if I were to go into the case, I could do no more than follow the course which has been so clearly, and in my opinion so satisfactorily, taken by my Brother FITZGERALD, leading to the conclusion to which he came, and in which I perfectly concur—that this was not a highway within the meaning of either the original Act or the general Towns Improvement Act. The grounds upon which it has been argued that this was a public road were, either that it was so by virtue of a dedication created by the statute itself, or authorised by it, and that the Grand Canal Company, having got the property in the land, have, by their own Act, dedicated the road to the public.

With respect to the statute dedicating it to the public, and making these trackways public roads, or making it imperative on the Grand Canal Company in any way to do so, see what would be the effect of giving that construction to the statute: it would really make it *felo de se*. Can any one who ever saw the way in which the Company carry on their business, in respect to the use of these trackways, imagine that the traffic could be carried on if these trackways were subject to be interrupted by a general right of the public to pass and repass over or along them at all times—even whilst the Company's horses go along them, dragging the boats by a rope? It is impossible to suppose that the Act meant to reserve that right to the public. The Company has got the power of allowing the public to use, to a certain extent, these trackways; but the Act simply allows them to do this for the purposes of revenue, so far as they can conveniently do so, and does not render it imperative on them to give this accommo-

(a) 2 Burr. 803.

dation in a way so guarded by the provisions of the Act itself as to secure the Company in the full enjoyment of the trackways for their own traffic.

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It is right to call attention to the Act 11 *G. 3 (Ir.)*, c. 31. It is a public Act, passed for a great national object; its recitals show that that was its nature, and that every inducement was given to the Company to carry on this national project. One of those inducements was this—that the Company might turn these trackways to account for the benefit of their revenue, so far as they conveniently could do so; for which purpose they were allowed to erect toll-gates, and take a certain toll from those who were allowed to pass, which otherwise they could not legally have done: and by this Act the Company are allowed, so far as they conveniently could, to open these to the public so often and as long as they might find it convenient and compatible with the carrying on of their own traffic; and thus to make a profit, so far as they could do so consistently with the objects of the Act. But are we to construe that as an absolute unqualified right of the public to use these trackways as public highways, and thereby defeat not only the special provisions, but the chief object of the Act, which was to promote this great public concern, and to induce this Company to engage in it, by giving them the possession and property of the ground, which would carry with it the right to shut up these trackways; but, accompanied by the provisions already adverted to, enabling the Company to turn them to account for the purpose of revenue, so far as they could do so consistently with a due regard to their own concern.

I therefore concur with my Brother FITZGERALD in holding, upon the first question, that this was not a public highway; and, as to the other, I think it a question of considerable difficulty, and leave it open to further consideration.

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COURT OF CRIMINAL APPEAL.

THE QUEEN v. JOHN VANDERSTEIN and Others.*

Aug. 18, 19,
 22.

V. was indicted for uttering certain forged orders for the payment of money, and convicted. He had fraudulently obtained certain forms of post-office orders from the office at N.; and also some with the N. stamp affixed. These orders, being filled up and signed G. J., "pro-postmaster," there being no one of the name of G. J. at N., were uttered by V. in payment for goods at D. No letters of advice were forwarded to D.

Held (dubitate Proor, C. B.), that V. was rightly convicted.

H. and S. were joined in

the same indictment and convicted. They had gone to the shop where V. uttered the orders, remaining outside in a cab, so situated that they could not see or be seen by the people in the shop. They had previously accompanied V. to another shop, where he failed to get change for the orders, and they assisted V. in taking away the goods obtained at the second shop.

Held, that, though they were not in the cab for the purpose of taking part in aiding or assisting in the actual act of uttering, they were rightly convicted.

THIS was a case reserved by the LORD CHIEF JUSTICE OF THE COMMON PLEAS and Mr. Justice O'BRIEN. The case stated contained the following facts:—

John Vanderstein, *alias* John Hamilton, William Harris, and Charles Somerville, were tried at the last Commission for the county of the city of Dublin, on an indictment that they, on the 28th of June 1865, feloniously did offer, utter, dispose of, and put off five certain forged orders for the payment of money, to wit, five forged post-office money orders, each for the payment of £10, with intent thereby then to defraud; they, the said John Vanderstein, William Harris, and Charles Somerville, at the time they so offered, uttered, and put off the said five forged orders for the payment of money, each for the sum of £10, well knowing each of same to be feloniously forged, against peace and statute, &c. It was clearly proved that, in the month of May last, the prisoner Vanderstein came to the post-office at Nether-stowey, near Bridgewater, in Somersetshire, England, and by pretending to the postmaster, Mr. Samuel Whedden, that he was an officer sent from the London post-office to investigate some complaints alleged to have been made, obtained from him, in order that same might be cancelled, a book containing

200 blank money orders. He also obtained from him some with the

* *Coram* LEFROY, C. J., MONAHAN, C. J., FIGOT, C. B., KEOGH, O'BRIEN, HAYES, JJ., FITZGERALD, B., FITZGERALD, J., DEASY, B., and O'HAGAN, J.

Nether-stowey stamp affixed, and also one signed order on Charing-cross post-office, for which he paid the amount, 2s. 6d. It was then proved that on the 28th of June, about two o'clock in the afternoon, the prisoner Vanderstein came to the shop of Messrs. Todd & Burns, in Mary-street, in this city, stating himself to be Captain Hamilton, and purchased a number of silk dresses, which he stated he wanted for his sister, and a trunk, which he directed them to be packed in, and that he would call and take them away, and pay for them, in the evening. The three prisoners called at the tavern of Mr. John Burgess, in Great Britain-street, about seven o'clock on the same evening, and having had a small quantity of sherry at the bar, thought it so good that they sent for Mr. Burgess to know whether he could let them have a dozen of it, and on his stating that he could, the prisoner Vanderstein asked him to change a £10 post-office order, which he stated he had that day received from England, but was late to get the amount at the post-office. Mr. Burgess having stated he had not sufficient money, Vanderstein offered him £1 if he would get it changed for him. Mr. Burgess took the order to some of the neighbouring shops, but none of those he applied to wished to take it; and on his stating his inability to get change for it, either Harris or Somerville said it was of no consequence, "as he or I can change it." Of course the dozen of sherry was not bought. No further evidence was given as to the particulars of the £10 order so attempted to be passed, and this transaction was not the subject of the present indictment.

A clerk in the employment of Todd & Burns happened to be at Mr. Burgess's while the prisoners were there, and saw what occurred. Shortly after leaving Mr. Burgess's, about eight o'clock in the evening, the prisoner Vanderstein came to the shop of Todd and Burns, the other two prisoners remaining outside in a cab, so situated that they could not see or be seen by the people in the shop. Vanderstein stated to the clerk in the shop that he had come for the goods laid aside for him; that he had that day received from his father, Mr. William Hamilton, who resided near Nether-stowey, £50 in post-office money orders; that on inquiring at the post-office he found he was late to obtain payment of them that day,

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and as he was anxious to be able to leave Dublin early next morning, he would be much obliged by the cashier changing them for him, who, thinking all was right, agreed to do so, and accordingly the prisoner Vanderstein gave to him the five orders, the subject of the present indictment, each for £10, and having the Nether-stowey stamp, dated the 26th of June, directed to the post-office, Dublin, requiring that office to "pay to the person named in my letter of advice the sum of £10," purporting to be signed by G. Jones, postmaster, with the name of John Hamilton signed to the receipt for the amount, which he stated was his name, and to whom the orders were payable. In exchange for the orders so passed, he received from the clerk at Todd & Burns's the goods and trunk laid aside for him in the early part of the day, and £20 in gold, he having paid some few shillings change to balance the account on one of the orders. He wrote, "From William Hamilton," to designate the person who forwarded them.

Immediately on getting the trunk with the purchased goods in it, Vanderstein had it brought to the cab in which the other two prisoners were waiting for him, and immediately the three drove away; and in the course of the same evening endeavoured to have the trunk forwarded to England from the Westland-row station; and after going from one place to another, at last, about 11 o'clock at night, went to Malahide by railway, and stayed at the Royal Hotel there for the night; the three prisoners having alternately taken very particular care of the trunk from the time they obtained it till it was brought to the bed-room in which Vanderstein slept at the hotel in Malahide. All this time they were followed and watched by a clerk in the employment of Messrs. Todd & Burns. The clerk, who had seen the prisoners at Mr. Burgess's, having returned to Messrs. Todd & Burns's just as the three prisoners were driving away in the cab, and whose suspicions were consequently excited when he heard of the five orders passed at the establishment of his employers. From inquiries made by the prisoners during the night, at Malahide, it appeared to be their intention to leave for Belfast by the first train the following day. They were arrested in the morning, when about leaving for Belfast.

In the trunk was found, in addition to the goods obtained from Messrs. Todd & Burns, a great number of the blank money orders, obtained in the month of May from the postmaster at Nether-stowey; as also the letters of advice belonging to the five orders, the subject of the indictment; as also a stamp die, with which the Nether-stowey postmark had been impressed on the orders in question.

On the prisoner Vanderstein was found £20 in gold; a gold watch, chain, and other property; and in the pocket of Somerville was found a bottle of a peculiar ink, said to be printers' ink, and a piece of chamois, probably used in the process of impressing the die; there were also found in the trunk letters and figures to be used in inserting the date in the stamp. The postmaster of Nether-stowey proved that the orders in question were five of the blank orders obtained by the prisoner Vanderstein in the month of May, as already stated; that they were not issued from the office there; that the stamp impressed was an imitation of the genuine stamp; that there was no such person in the office as G. Jones, by whom, as pro-postmaster, they purported to be signed. He also proved the course of issuing money orders to be:—the party applying for one states the name of the party sending it, and of the party to whom payable, the office on which it is to be drawn, and the amount; these are all inserted in the printed form of the letter of advice, which is stamped with the stamp of the office that day in use, and is forwarded by post to the post-office where the order is payable. The blank order is then filled with the amount, and name of the office where payable, and signed by the postmaster, or person acting for him. The number of the order is the same as that of the letter of advice. When the order is presented for payment, the person paying same refers to the letter of advice, to see that the name subscribed to the receipt is the name of the person to whom the order is payable; and, should he consider it necessary, also inquires the name of the party who obtained the order. The amount of the order is then paid to the person presenting it, whether the person to whom it is payable or not, the

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officer being satisfied that the receipt is signed by the proper party. On the back of each order is a notice that, after once paying a money order, by whomsoever presented, the office will not be liable to any further claim.

At the close of the case for the Crown, Mr. *Curran*, on the part of the three prisoners, submitted that the orders in question were not orders for the payment of money within the statute, on two grounds:—first, that there was no such person as G. Jones, by whom the order purported to be signed; and, secondly, that inasmuch as no letter of advice, in relation to the orders, had been forwarded to the Dublin office, there was no obligation on the part of that office to pay the amount; the request being to pay to the person named in the letter of advice. And, with respect to the prisoners Harris and Somerville, this further question was raised—whether they could be convicted of uttering the orders in question, inasmuch as at the time of uttering same they were not actually present, within sight or hearing of what was going forward, nor had they come to the place where they were to aid or assist in the actual act of uttering.

Chief Justice MONAHAN informed the jury that, notwithstanding Mr. *Curran's* objection, the opinion of the Court was, that the orders in question were orders for the payment of money within the statute; and, on the other point, informed them that if the prisoners Harris and Somerville, with the knowledge of the orders being forged, accompanied Vanderstein to the door of the shop of Messrs. Todd & Burns, in order that he might pass same, and that he did so; and that while he was so passing same they remained in the cab outside, for the purpose of taking away him and the money and goods to be obtained for the orders; that they should be convicted, notwithstanding that from the cab where they were they could not see or be seen by the person to whom the orders were uttered, and notwithstanding they were not there for the purpose of taking part in, or aiding or assisting in, the actual act of uttering.

The jury convicted the three prisoners, who have been sentenced to several periods of penal servitude—Vanderstein to twenty years, Harris to ten years, and Somerville to six years; but execution of

the sentence is stayed, the prisoners remaining in custody in the meantime.

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The opinion of the Court is required on the following questions—

First; whether the fact of there being no such person as G. Jones, by whom the orders in question purported to be signed, or there having been no letters of advice forwarded to the Dublin Post-office, prevent the orders in question being orders for the payment of money within the statute. Should the Court be of opinion that they were not such orders for the payment of money, the judgment should be reversed as to the three prisoners.

Secondly; whether, in consequence of the prisoners Harris and Somerville having been in the cab outside Messrs. Todd & Burns's establishment, as hereinbefore mentioned, at the time of uttering the orders in question by Vanderstein, and not being there for the purpose of taking part in, or aiding or assisting in, the *actual uttering* thereof, *the jury should have been directed to acquit them*. If the Court should be of that opinion, the judgment should be reversed as to them, but be affirmed and remain in force as to the prisoner Vanderstein.

The money orders are to the following effect:—

NETHER-STOWEY. $\frac{15}{44}$ No. 57.

STAMP OF
ISSUING OFFICE.
[Date, &c.]

MONEY ORDER.

Pay the person named in my letter of advice
the sum of £10.

To the Post-office at *Dublin*.

G. Jones, Pro-postmaster.

Received the above—

John Hamilton, { Signature of
Payee.

A fac-simile of the money-order and letter of advice* is in the possession of the Clerk of the Crown, attached to the original case.

J. A. Curran sen., for the prisoner.

There are two questions for the decision of this Court—whether this was a money-order or not? and, secondly, as regards the pri-

* See annexed Letter of Advice and Instructions.

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soners Harris and Somerville, whether they were accessories before the fact?

The money order is signed "G. Jones, pro-postmaster, ———", there being no such person; and no letter of advice was forwarded. The letter of advice is the money order. This document, taken by itself, would never get the money paid. *Archb.*, p. 505, defines money-order "a warrant or order for the payment of money." It must be shown to be signed by some one who can command payment of the money. This is not directed to any one. It is an order made upon nobody. The party sending a money order should be compellable to pay it. But here there was no such person as the sender: *Rex v. Clinch (a)*.—[PIGOT, C. B. This was signed by the pro-postmaster.]—This is nothing more than a receipt. In *Rex v. Ansel (b)* the order was a genuine document; the only forgery being the name of the payee: *Rex v. Ruhsworth (c)*.—[O'BRIEN, J., refers to *Regina v. Lockett (d)*.—PIGOT, C. B. Supposing this document genuine, on the facts proved, anybody could have been sued upon it.]—If I wrote, "pay £10," is that a money order?—[KEOGH, J. This order issued from the office at Nether-stowey, and purported to be signed by the postmaster.]—It was not issued, for it was not stamped. *Rex v. Gilcreest (e)* goes very near this case.—[O'HAGAN, J. There, they were bound to show that it was signed by the postmaster.]—*Rex v. Baker (f)*. The document must import disposing power over the subject-matter of the forgery.

Aug. 19.

Mr. Curran resumed his argument on this day, and cited *Rex v. Vivian (g)* and *Rex v. Ferguson (h)*. If money were paid without the letter of advice, it could not be recovered from the writer.—[FITZGERALD, B. There is a distinction between "a warrant for money" and "an order for money."—HAYES, J. The statute allows reference to the thing by the name by which it was generally known.]—But the statute distinguishes between a receipt or

(a) 2 East, Pl. of Cr. 938.

(b) 8 C. Cr. C. 409.

(c) R. & R. 317.

(d) 2 East, P. C. 940

(e) 2 M. C. C. 233.

(f) 1 Moo. C. C. 231.

(g) 1 C. & K. 719; S. C., 1 Den. C. C. 65.

(h) 1 Cox's C. C. 241.

Nether Stowey.

No. 63

Stamp of
Issuing Office.

15
44

Nether Stowey.

No. 63

Stamp of
Issuing Office.

15
44

£	s.	d.

MONEY ORDER.

Advice of Money Order drawn by the above Office upon the
Office at.....

£	s.	d.

for.....
{ Post-
master.

THE PAYEE: viz., the Person to whom the Order is payable.

CHRISTIAN NAME. SURNAMES.

THE REMITTER: viz., the Person who paid in the Money, and obtained the Order.

CHRISTIAN NAME. SURNAMES.

This Advice must be signed and stamped by the Postmaster who draws the Order, and stamped on receipt by the Postmaster on whom it is drawn, and the latter must retain it until the corresponding Order has been presented and paid, or has become lapsed. The Advices relating to the Orders paid daily, must be forwarded by the very first Post after payment to the Chief Money Order Office in the Kingdom in which is situated the Town where such Order was granted,—namely, to London, if the Order is granted in England; to Dublin, if granted in Ireland; and to Edinburgh, if granted in Scotland.

N.B.—A separate Advice must invariably be sent for each Order.

Pay the Person named in my Letter of Advice the Sum of
£.....s.....d.....

To the Post Office at.....

Postmaster.

Received the above,

The Person to whom this Order is made payable, must sign here his or her Christian and Surname: in the case of Firms, the usual Signature will suffice, if so advised at the paying Office.

{ Signature
of Payee.

If this Order be payable at any Office in the United Kingdom, and the Payee or Remitter should require payment at any other Office in the United Kingdom, the following request must be signed, and the Order must be receipted, and forwarded, in a printed Form, which may be obtained at any Money Order Office, to the Postmaster of the Office on which it is originally drawn, who will send a new Order for the amount, less the commission.

{ I request that this may be exchanged
B } for a new Order payable at
* Here state the name of Office.

{ Signature.

If the Remitter of an Order issued and payable in the United Kingdom is desirous of delaying payment for ten days, he must, at the time of the issue of the Order, affix a Penny Receipt Stamp in the space after the Request C, allotted for his Signature (which Signature must be written across the Stamp), and he must then hand the Order to the Issuing Officer, so that the necessary instructions may be given to the Paying Officer.

{ I request that this Order may
C } not be paid until ten days
after the date of issue.

{ Signature
of
Remitter.

For further Instructions see Back.

INSTRUCTIONS.

Take Notice.

If payable in the United Kingdom, payment of this Order must be obtained before the end of the second Calendar Month after that in which it was issued (for instance, if issued in January, it must be paid before the end of March), otherwise a new Order will be necessary, for which a second Commission will be charged; but if payable in any of the Colonies with which Money Order business is transacted, or at Malta or Gibraltar, the period for payment is extended to Six Months. As respects both classes of Order, if payment be not made before the end of the Twelfth Calendar Month after that in which it was issued (for instance, if issued in January and not paid before the end of the next January), all claim to the Money will be lost. **AFTER ONCE PAYING A MONEY ORDER, BY WHOMSOEVER PRESENTED, THE OFFICE WILL NOT BE LIABLE TO ANY FURTHER CLAIM.**

If this Order be drawn on any of the Colonies with which Money Order business is transacted, application for transfer from one Office to another within the Colony must be made to the Postmaster at whose Office the Order is payable; but, if repayment be required, application must be made to the Controller of the Chief Office of the Kingdom in which the Order was issued, and the amount of a second commission (inland rate) must be inclosed in Postage Stamps.

If an alteration in the name of the Remitter or Payee should be required, application must be made by the Remitter to the Postmaster of the Office at which the Order was issued, and a second commission, in Postage Stamps, must be paid.

If a duplicate be required of any Order issued by one Office on another in the United Kingdom, or if it be necessary to stop payment of an Order so issued, an application, inclosing a second commission in Postage Stamps must be sent, in the former case, to the Controller of the Chief Office of the Kingdom in which the Order was issued; and, in the latter case, to the same Officer of the Kingdom in which the Order is payable. In the case of an Order issued in the United Kingdom on the Colonies, or vice versa, such applications must be made to the Controller of the Chief Money Order Office of the paying Country.

To save time and prevent errors, the public are advised to furnish in writing to the issuing Postmaster the full particulars of every Money Order required, and to ascertain, before quitting the Office, that the Order corresponds with those particulars.

Whoever presents the Order for payment, must give information as to the Christian Name and Surname of the Remitter, unless remitted by a Firm, when the name of the Firm will suffice.

The only exception to this rule is—

When the Order is presented through a Bank of the Town upon which it is drawn, in which case it will suffice that the Order being signed it be also crossed with the Banker's Name.

These regulations have been laid down to secure, as far as practicable, that payment be made to the rightful party, and the Postmasters and others have been instructed to enforce them so far as a due regard to Public convenience will permit. The Public are strictly cautioned—

1st.—To guard against the loss of a Money Order.

2nd.—Never to send the Order in the same Letter with the information required on payment thereof.

3rd.—To be careful in taking out a Money Order to state correctly the Christian, as well as Surname of the person in whose favour it is to be drawn.

4th.—To see that the Name of the person taking out the Order is correctly known to the person in whose favour it is to be drawn.

Neglect of these instructions will risk the loss of the money, besides leading to delay and trouble in obtaining payment.

Under no circumstances can payment of an Order be demanded on the day of its issue.

The Commission (to be paid on issue) for a single Order is as under:—

For Sums.....	Not exceeding £2		Above £2 and not exceeding £5		Above £5 and not exceeding £7		Above £7 and not exceeding £10		No Single Order can be granted for more than £10.
	s.	d.	s.	d.	s.	d.	s.	d.	
If payable in the United Kingdom ..	0	3	0	6	0	9	1	0	
— " " Malta or Gibraltar.....	0	9	1	6	2	3	3	0	
— " " the Colonies.....	1	0	2	0	3	0	4	0	

Money Orders are issued and paid in London, Dublin, and Edinburgh, between the hours of 10 a.m. and 4 p.m., except on Saturday, when the Chief Money Order Offices of London, Dublin, and Edinburgh; the London Head District Offices; the Branch Offices at Charing Cross and Lombard Street; with the Provincial Post Offices at Glasgow, Liverpool, and Manchester, close at 1 p.m. At most Country Offices Orders are paid from 9 a.m. to 6 p.m., and the time is never less than from 10 till 4. A Postmaster, however, is, in some cases, allowed to suspend the business during the time he is making up his Letter Bags, &c., provided a notice of the intervals be placarded at his Office.

order; and here we are dealing with an order or nothing; for the indictment states it to be an order.

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The question as to two of the prisoners remains; they were no parties to the actual uttering. There are four modes of dealing with a felonious act:—first, indicting as principal in the first degree; secondly, as principal in the second degree; thirdly, as accessory before the fact; fourthly, as accessory after the fact. There must be evidence to show that the accused took an active part in the transaction, to enable them to be convicted as accessories before the fact. The evidence must show that they either procured, counselled, commanded, or abetted the principal. If these men are guilty, they must be so as accessories before the fact. The transaction in the public-house does not make them accessories; there is no evidence that they even knew the purpose of going into the public-house. Principals in the second degree must be indicted in a different way from principals in the first degree. These men are indicted generally as principals. The evidence must go to show that they are accessories before the fact: *Rex v. Kelly (a)*; *Rex v. King (b)*; *Rex v. Soares (c)*.—[O'BRIEN, J. Their subsequent acts may be brought in evidence to show they were accessories before the fact.].—Yes; but they must be shown to have consulted about it before.—[FITZGERALD, B. Have not the jury found that they went, knowing the orders to be forged, in order that the other prisoner might pass them, though they were not present at the actual passing?].—That would make them accessories before the fact; but they were tried as principals, and convicted as such: *Rex v. Davis (d)*; *Rex v. Badcock (e)*; *Rex v. Loughran (f)*.—[FITZGERALD, J. I hold that the question was left to the jury that they were principals in the second degree.].—In that case I am entitled to an acquittal, as there is no act authorising the trying a principal in the second degree as a principal in the first degree.—[O'BRIEN, J. There are two forms in *Archbold*—one at page 817, another, page 819.]

(a) R. & R. 421.

(b) *Ibid*, 332.

(c) R. & R. 25.

(d) R. & R. 113.

(e) R. & R. 249.

(f) 3 Cr. & D. 233.

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Walsh (with him *Barry* and *Concanon*), for the Crown.

Is this document a money order, or a bit of a money order? does it purport on the face of it to be payable? The document in the cases cited did not comply with the Act of Parliament:—*Rex v. Rushworth* (a). The result of the opposite argument is that the clumsy forger gets off; the clever one is convicted. The 11 & 12 Vic., c. 88, deals with money orders. The *document issued* is always what is called there “the money order.” This document represents on the face of it that the letter of advice was sent, and everything done to make it valid; it is the same as the case of a circular note. The letter of advice is merely to identify the person who is to be paid, so as to expedite the transaction.—[MONAHAN, C. J. My idea is, that this document, representing everything to be done that ought to be done, makes it a forgery.—LEFROY, C. J. We must assume that the party did not intend to forge a document that would be nugatory.]—Just so. There is the case of a draft on a bank, where no assets, held clearly a forgery: *Rex v. Lockett* (b); *Gilcreest's case* (c). In *Rex v. Ferguson* (d) the forger did not go on to complete what was requisite to make it payable. In *Rex v. Richards* (e) and *Rex v. Randall* (f) the orders were not completed. As to the second point, no question was raised at the trial whether he was accessory or principal. The distinction between the first and second degree arises from the necessity of distinguishing between clergeable and unclergeable felonies. The form Mr. *Curren* refers to was necessary then, but not now. Actual corporeal presence is not necessary to make a man a principal: *Fost. Cr. Law*, pp. 349 and 350; 2 *H. Pleas*, c. 29, sec. 8. All the authorities from *Russell & Ryan* show that they ought not to be convicted as accessories, but as principals: *Regina v. Soares*, *Rex v. Else* (g), all reviewed in *Regina v. Greenwood* (h); *Rex v. Sheritt* (h); *Rex v. Mills* (k).

(a) R. & R. 317.

(c) C. & Marsh, 224.

(e) R. & R. 193.

(g) R. & R. 142.

(i) 2 C. & P. 427.

(b) Leechm. 94.

(d) 1 Cox C. C. 241.

(f) R. & R. 195.

(h) 2 Den. C. C. 453.

(k) 7 C. & P. 665.

Barry.

This is a document issued by the public officer; and the presumption of law is always of the proper fulfilment of public duties. The 3 & 4 *Vic.*, c. 96, and 11 & 12 *Vic.*, c. 81, regulate the issue of post-office orders; and it will be seen that the letter of advice is a mere arrangement among the post-office authorities themselves. The only effect of not sending the letter of advice is to delay the holder: *Regina v. Rushworth* (a); *Rex v. Thorn* (b); *Archbold Pl. & Ev.*, page 617. As to second point, see *Rex v. Owen* (c).

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Curran, in reply.

This document, it is said, is called a money order in the statute. Why it is so called before it is signed at all; but it is of no use until it is signed. The real test is, could the postmaster here recover against the postmaster at Nether-stowey if he paid it without the letter of advice? This is clear from *Vivian's case* and *Ferguson's case* (d).

LEFROY, C. J., on this day delivered the judgment of the Court.

Aug. 22.

There were two points made in this case for the prisoners—firstly, that these documents were not post-office orders; and on that we are all agreed; secondly, that two of the prisoners were not present when Vanderstein obtained the money and goods. The Judge told the jury that, notwithstanding Mr. *Curran's* objection, his opinion was, that the orders in question were orders for the payment of money within the statute; and that, if the prisoners Harris and Somerville, with the knowledge of the orders being forged, accompanied Vanderstein to the door of the shop of Messrs. Todd & Burns, in order that he might pass same, and that he did so; and that while he was so passing same they remained in the cab outside, for the purpose of taking him away, and the money and goods to be obtained for the orders; that they should be convicted, notwithstanding that from the cab where they were, they could not see or be seen by the person to whom the orders were

(a) R. & R. 317.

(b) 2 Moo. C. C. 210.

(c) 1 M. C. C. 96.

(d) 2 Moo. 233.

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uttered, and notwithstanding they were not there for the purpose of taking part in the actual act of uttering.

The question really reserved for us is, whether this charge was correct? Now these documents had all the *indicia* of post-office orders. There is every circumstance to give them the verisimilitude of post-office orders. It is said no letters of advice were sent. They imported that letters of advice were sent, and they directed payment of the money to the person who had forged them. We are, therefore, of opinion that the learned Judge's charge was quite correct as to the first point. On the second point, the Judge told the jury that if the prisoners came to the shop with a guilty knowledge of the purpose, and were there to assist in any part of the transaction, they were persons aiding and assisting, and liable accordingly; and it seems plain to me that, although these parties took no part in the act of uttering, yet, if they came there with a knowledge of the guilty purpose, they are liable, as *participes criminis*, though not taking part in that particular act. In fact, if any doubt were raised upon this point, it would come to this, that where several acts were necessary to a particular purpose, a prisoner would escape because there was one of them he refrained from taking a part in, though he had a guilty knowledge of the purpose. He could say, I did not take part in that particular act, though I acted as an accomplice in other parts of the transaction. Where a party goes to assist in one of a series of acts done in carrying out the guilty purpose, or which constitute the crime charged, he is an accomplice, and he cannot protect himself because he did not take part in another portion of the series. It appears to me, therefore, that on both points there is unquestionable evidence to support the charge.

PIGOT, C. B.

As to the second point, I entertain no doubt. I think the objection cannot be sustained. As to the first point, the question what is, and what is not, an "order for the payment of money," is one which, if I may use the phrase, has been vexed by decisions which it is difficult to reconcile. Many of those decisions were made

when the result of a conviction for forgery was the penalty of death; and when a very small matter was made the ground of a determination *in favorem vitæ*. I entertain considerable doubt, founded on those authorities, and on those authorities alone, whether the document in question in the present case was "an order for payment of money" within the decisions which have expounded those words. Several of those decisions tend strongly to support the argument of the prisoners' Counsel, that, where a document is incomplete, it does not constitute forgery to simulate it. Consequently, with those authorities, I find it difficult to determine that what was done with this document was a forgery. No letter of advice was transmitted to the Post-office at Dublin. The document purported to be signed by the officer of the Post-office at Nether-stowey, but was not signed by him. He could not have been answerable for the amount, even though the document had been signed by him, if it were paid without the letter of advice. The officer at the Dublin Post-office would not, without a letter of advice, have been authorised to pay it. Among the cases to which I refer are: *Rex v. Ravenscroft* (a); *Rex v. Turpin* (b); *Regina v. Thorn* (c); *Regina v. Roberts* (d); *Rex v. Clinch* (e); *Rex v. Ellor* (f). Whatever my opinion might be if this were *res nova*, I doubt that the conviction before us can be sustained consistently with those authorities.

(a) Russ. & Ry. 161.

(c) 2 Mood. C. C. 210.

(e) 2 East., P. C. 938.

(b) 2 Car. & Kir. 820.

(d) 2 Mood. C. C. 258.

(f) 1 Leach. C. C. 363.

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May 1, 2, 11.

The plaintiff purchased from the defendant, a seed merchant, a quantity of rape seed. The defendant's salesman, who sold the seed to the plaintiff, knew at the time of the sale that it was required for the purpose of being sown, and producing a crop. The only express warranty provided was contained in the following evidence of the defendant's salesman, as to what passed between him and the plaintiff at the time of the sale:—"The plaintiff asked me if we had Dutch rape seed; I said we had, but of last year's importation; he asked me if it was good; I said I believed it to be so." The seed was in the defendant's store at the time; but the plaintiff did not examine it.

THE summons and plaint in this case contained four counts. The first two were in contract; the third on a warranty; and the fourth for false representation; but, as the plaintiff elected to take his verdict on the second and third alone, it is only necessary to state the substance of those counts. The second count stated that, at the time of the purchase and agreement thereafter mentioned, the plaintiff intended, and was about, to sow land with rape seed, for the purpose of obtaining a crop of rape out of the said land; and the plaintiff ordered and agreed to buy, at a certain price, of and from the defendant, then carrying on the business of a seed merchant, a quantity of rape seed, for the purpose, as the defendant then well knew, of sowing the same in the said land, and of obtaining a crop of rape therefrom; and the defendant then agreed to supply the same, in the way and course of his said business, for the purpose aforesaid, and then promised the plaintiff that the said seed should be good growing seed, and fit for the purpose aforesaid; and should be and be supplied in a condition and of a quality reasonably fit and proper for the said purpose; and, although the defendant did supply rape seed for the purpose

In an action to recover damages resulting from the failure of the crop, declaring on a warranty that, at the time of the sale, the seed was reasonably good growing seed, and fit and proper to be used for the purpose of sowing, and of producing a reasonably good and productive crop—

Held (dissentiente CHRISTIAN, J.), that, whether the representations made by the defendant's salesman amounted to an express warranty or not, they did not exclude an implied warranty of the effect declared on.

Held also (dissentiente CHRISTIAN, J.), that the rule that, "where a buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose," applies as well to natural products as to manufactured articles.

aforesaid, and the plaintiff paid for the same at the price aforesaid, and although all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action, yet the said rape seed was not of the description and quality aforesaid, but was of a different and inferior quality and description, and was not fit and proper for the said purpose, nor supplied in a fit and proper condition; but was unsound and bad, and not fit for growing and producing a crop.

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The third count stated that the defendant, by warranting that certain rape seed was then reasonably good growing seed, and fit and proper to be used for the purpose of sowing the same in the plaintiff's land, and of producing a reasonably good and productive crop, sold the same to the plaintiff, to be used for the purpose aforesaid; yet the said rape seed was not then reasonably good growing seed, and was not then reasonably fit and proper to be used for the sowing therewith the said land of the plaintiff, and of producing a reasonably good and productive crop.

The defendant traversed the contract, warranty, and representation, declared on in the several counts respectively. Issues thereon.

The case was tried before the Hon. Mr. Justice O'Brien, at the last Summer Assizes for the North Riding of the county Tipperary. It was admitted that the seed had failed to produce a reasonably good crop; and it was proved that a great part of it had not vegetated at all. A number of witnesses were examined on both sides; but the only evidence necessary to be stated was that of Mr. John Butler, the defendant's book-keeper and salesman, who was examined on behalf of the defendant. The material portions of his evidence were as follows:—"I know the plaintiff; he came to defendant's office in Denmark-street, Dublin, on the 20th of August last; he asked me if we had Dutch rape seed; I said we had, but of last year's importation. He asked me if it was good; I said I believed it to be so; he desired me to send him five stone of it by railway to Kells. That was all the conversation I had with him." On cross-examination he stated—"I knew the plaintiff was a gentlemen farmer, and that

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was alleged, was present at the interview between Butler and the plaintiff; but, at the suggestion of the learned Judge, the jury retired to consider the two following questions, which were submitted by him for their consideration—first, as to what took place on the occasion of the interview between the plaintiff and Butler; secondly, as to the quality of the seed. The jury on their return stated that they were of opinion that Mr. Butler's account of what took place at the said interview was correct, but that they were not agreed as to the quality of the seed.

The learned Judge, afterwards, in his charge to the jury, told them that, on the one hand, mere representations by a vendor, of the quality of goods on a sale, would not of itself constitute a warranty or engagement which would render the vendor responsible for such representation, unless he knew at the time that such representation was untrue. But that, on the other hand, no particular form of words was requisite to constitute such warranty or engagement; and that if the vendor, at the time the article was ordered, knew of the purpose for which the article was wanted, and that the purchaser relied upon the vendor's judgment, then the latter impliedly warranted that the thing furnished would be reasonably fit and proper for the purpose for which it was required.

His Lordship also told the jury that, even though they believed Butler's evidence as to what took place at the interview between him and the plaintiff was correct, still that they might, on the entire evidence, infer that there was such an agreement, promise or warranty as alleged in the first three counts respectively, if they were also of opinion that Butler knew at the time of the purpose for which the seed was ordered—viz., for the purpose of producing a crop. Counsel for the plaintiff objected to this direction, and required the learned Judge to tell the jury that, if they believed that the seed was, to the knowledge of the defendant, ordered for the purpose of producing a crop, they should find for the plaintiff.

Counsel for the defendant also objected to the direction of his Lordship, and required him to tell the jury that, if they believed the account given by Butler of his interview with the plaintiff, there was no engagement, promise, or warranty as alleged in the first, second and third counts respectively. His Lordship refused to accede to either requirement, but left the case to the jury, with the directions he had given them. The jury found for the defendant on the issue as to the false representation, and for the plaintiff on all the other issues, with £25 damages.

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Sergeant *Armstrong* having obtained a conditional order for a new trial, on the grounds, firstly, of misdirection by the learned Judge; and, secondly, that the verdict was against the weight of evidence—

Hemphill and *Tandy* now showed cause, and cited *Bigge v. Parkinson* (a); *Smith's Mercantile Law*, p. 517; 2 *Kent's Commentaries*, p. 479; *Jones v. Bright* (b); *Brown v. Edgington* (c); *Gray v. Cox* (d); *Shepherd v. Pybus* (e); *Parkinson v. Lee* (f); *Bluett v. Osborne* (g); *Gardiner v. Gray* (h); *Burnby v. Bollett* (i); *Black v. Elliott* (k); *Sutton v. Temple* (l); *Smith v. Marable* (m); *Morley v. Attenborough* (n); *Sims v. Marryatt* (o); *Eichholtz v. Bannister* (p); *Rowe v. Farren* (q).

Sergeant *Armstrong*, and *Curtis*, in support of the conditional order, cited *Allen v. Lake* (r); *Pindar v. Button* (s); *Budd v. Fairmaner* (t).

Cur. adv. vult.

(a) 7 H. & N. 955.

(c) 2 M. & Gr. 279.

(e) 3 M. & Gr. 868.

(g) 1 Starkie, 384.

(i) 16 M. & W. 644.

(l) 12 M. & W. 52.

(n) 3 Exch. 500.

(p) 34 L. J., N. S., C. P. 105; S. C., 11 Jur., N. S. 15.

(q) 8 Ir. Com. Law Rep. 46.

(s) 11 W. R. 25; S. C., 7 L. T. 269.

(b) 5 Bing. 533.

(d) 4 B. & Cr. 108.

(f) 2 East. 313.

(h) 4 Camp. 144.

(k) 1 F. & F. 595.

(m) 11 M. & W. 5.

(o) 17 Q. B. 281.

(r) 18 Q. B. 560.

(t) 8 Bing. 48.

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May 11.

On this day the Court delivered judgment.

O'HAGAN, J.

This was an action brought for the recovery of £100 damages, for breach of warranty of rape seed sold by the defendant, a seed merchant of this city, to the plaintiff, who is a country gentleman. The summons and plaint contained four counts; the three first relied on the breach of warranty, and the fourth was for deceit.—[His Lordship read the second and third counts.]

The defendant pleaded several defences, traversing the warranty and the deceit; and alleging that the seed supplied was in accordance with the defendant's contract. Issues were knit, and the case was tried before Mr. Justice O'Brien, at the last Summer Assizes for Tipperary. A number of witnesses were examined, whose evidence is immaterial for the purposes of this motion, with the exception of small portions of that given by the plaintiff and Mr. John Butler, the book-keeper and salesmaster of the defendant.—[His Lordship read the evidence of Butler.]—At the close of the case, the learned Judge reports his charge to the jury in this way—[His Lordship read the material portions of Mr. Justice O'Brien's charge.]—The jury found for the plaintiff, with £25 damages. A conditional order to set aside the verdict was obtained, on the grounds of misdirection by the Judge, and that it was against evidence and the weight of evidence. Against this order, cause has been shown; and with its second ground I need not deal, as the Court unanimously think that ground untenable; and, on the further argument of the case, it has not been pressed at the Bar.

The first ground remains; and the single and serious question for consideration is, whether, in the absence of an express warranty on the part of the plaintiff, under the circumstances, and with reference to the subject matter of the contract—rape seed—a warranty can be implied. On the one side it was contended, that the sale having been made by a dealer, to a customer who relied upon his judgment, with knowledge of the object for which the seed was desired—namely, for sowing—the law implies a warranty that it should be reasonably fit to grow, and produce a reasonably good crop. On the other side, it

is said, that although, with reference to manufactured goods, on which human art and skill have been expended, such a warranty might be implied, under like conditions, there can be no such implication as to a mere natural product, in which the defects are latent, and not to be presumed to be known by the vendor, as he may be presumed to know them in the case of things produced or modified by man's labour. I am of opinion, that there was no misdirection by the learned Judge, and that there should be no new trial.

The case is not free from difficulty; it is rather of the first impression; and I do not believe that it has been expressly settled by authority. But I think, having regard to the principles of decided cases and the reason of the thing, we are justified in holding that there was an implied warranty by the defendant, such as is set forth in the third paragraph of the summons and plaint,—not a *general warranty of goodness in the rape seed, or that it would produce a good crop*, but that, at the time of the sale, whatever afterwards happened from any cause, it was fit to grow, and to grow reasonably well. Two principles seem to be clearly established by the cases, and which are stated in *Chitty on Contracts*, p. 399. First, in the words of Lord Tenterden:—"That if a person sells a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose:" *Gray v. Cox (a)*. And, next, in the words of Chief Justice Tindal, "That if a party purchases an article on his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies on the judgment of the seller, and informs him of the use to which the article is to be applied, the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed:" *Brown v. Edgington (b)*. Those principles are adopted and sustained in *Jones v. Bright (c)*; *Charter v. Hopkins (d)*; *Shepherd v. Pybus (e)*; and *Bigge v. Parkin-*

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(a) 4 B. & C. 115.

(b) 2 M. & G. 289.

(c) 5 Bing. 533.

(d) 4 M. & W. 499.

(e) 3 M. & G. 868.

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son (a) in the Exchequer Chamber—the last case deciding that an express warranty does not necessarily displace the warranty that is implied from the circumstances and relations of the parties.

These principles appear to me to be applicable to the case before the Court; and I think that the grounds of the decisions, and the terms in which they are conveyed, sustain the view which the learned Judge presented at the trial for the guidance of the jury. The sale of the rape seed was made by a dealer: it was made for a particular purpose—that the seed should be sown; and that purpose was known to the seller; it was made in reliance on the judgment of the seller, and not of the vendee, who never saw the article nor sought to see it; and the facts, therefore, seem to me to present all the conditions needful to the implication of a warranty that it was *fit for sowing, fit for germination, and fit to produce a crop*. And this would be admitted, if the article purchased were a manufactured article and not a natural product, as rape seed is alleged to be. But I do not find, in the cases to which I have adverted, any words indicating such a limitation of their authority; and I cannot see, unless it be established by positive law, that such a limitation is warranted by public policy or the interests of society. There is no case expressly deciding that a warranty may be implied upon the sale of such a commodity as rape seed; but I have discovered none expressly to the contrary effect. *Parkinson v. Lee* (b) has been cited on the part of the defendant. But that was a sale of hops by sample, and the purchaser did not rely on the vendor's judgment, but on his own; and so it is explained by Chief Justice Tindal, in *Shepherd v. Pybus* (c). *Bluett v. Osborne* (d) was also cited for the defendant. In that case, Lord Ellenborough held that the seller was not responsible for a defect in a bowsprit; but that case, also, Chief Justice Tindal distinguishes on the same ground, the purchaser having had as full an opportunity of judging of the quality of the thing as the vendor himself; and, in *Brown v. Edgington* (e), Maule, J., says:—"In *Bluett v. Osborne* there was

(a) 7 H. & Nor. 955.

(b) 2 East. 314.

(c) 2 M. & G. 881.

(d) 1 Starkie, 384.

(e) 2 M. & G. 286.

"a sale of the specific bowsprit: it is like the sale of a particular horse." The decision in that case was made at *Nisi Prius*; but, be it right or wrong, it is distinguishable on the grounds which the Judges have thus clearly suggested; and they distinguish it also from the case before us, in which there was no sale by sample, and no sale of a specific article. The case of *Jones v. Bright (a)* has been much relied on by the defendant. I do not think it establishes the distinction on which he relies. There, copper was sold for the purpose of sheathing a ship; it was not fit for that purpose, and the Chief Justice states the law thus:—"If a man sells generally, he undertakes that the article is fit for *some* purpose; if he sells it for "a particular purpose, he undertakes that it shall be fit for that "particular purpose:" and the decision was with the plaintiff, who insisted on the warranty. But it is said that in the judgment a great difference was admitted between contracts for horses and the warranty of a manufactured article; as, whilst no prudence can guard against latent defects in a horse, by providing proper materials, a merchant may guard against defects in manufactured articles. The Chief Justice says:—"If a man sells a horse generally, he warrants no more than that it is a horse." This is quite true; but it does not seem to me to maintain the defendant's position. It would have that effect if the plaintiff contended, under the circumstances, for a warranty that the seed was good seed generally, or that it would produce any particular kind of crop. But his contention merely is, that the seed, according to the implied engagement, should have been sowing seed—seed capable of growth, and reasonably fit to grow and produce a crop. In this view, the *dicta* of *Jones v. Bright* go far to support his argument. The jury have found, not that the rape seed did not produce a good crop, but that it was not fit to produce any; and, if it was not, it was fit for *no* purpose contemplated between the parties to the bargain—was fit for *no* purpose; and, being without the germinating principle—its essential life and only usefulness—it as little fulfilled the contract to give *sowing* seed as a dead horse would

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(a) 5 Bing. 533.

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These are the cases that have been mainly relied on by the defendant; and I do not find in them, or in any others, anything which coerces me to the conclusion that the general principles to which I have adverted should be applied only in the case of manufactured articles. The course of decision appears to me to have gradually but steadily increased the responsibility of vendors, and the corresponding protection of purchasers. The manufacturer was first made liable impliedly, as he should have special knowledge of any defects in his own workmanship; the responsibility was extended to the mere vendor, though he had had nothing to do with the making of the articles in which he dealt, and might be supposed to be as ignorant as any body else of any of their latent defects. And so, if there be no coercive decision to the contrary, I see no reason why the seller of such a commodity as rape seed should not be held responsible, if it be not fit for the purpose for which it is sold, or *for any purpose at all*. Suppose the vendor and purchaser to be equally innocent, who is to suffer in such a state of things? The vendor can make inquiries; he can buy from persons of assured integrity and competent knowledge; he can indemnify himself against loss in his dealings with them; he can discover, with sufficient certainty for every practical purpose, by such experiments as were actually tried by the defendant—by planting some of the seed and ascertaining its capacity of germination—whether the article be of a character to warrant him in disposing of it; and having these and other advantages, it seems to me no hardship that, when he makes profit by sale to those who rely upon his judgment and cannot rely upon their own, he should hold them harmless if the article he supplies turn out to be utterly worthless, and of no sort of value. I think there is sound sense in the words of Chief Justice Best in *Jones v. Bright*, and I shall conclude by citing them, as of useful application to the case:—
 “It is the duty of the Court, in administering the law, to lay down
 “rules calculated to prevent fraud; to protect persons who are
 “necessarily ignorant of the qualities of a commodity they pur-

"chase ; and to make it the interest of manufacturers, and those who
 "sell, to furnish the best article that can be supplied."

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On the whole, I am of opinion that the Judge's direction was
 right, and that the verdict should not be disturbed.

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CHRISTIAN, J.

The order for a new trial should, in my opinion, be made absolute. I think the jury should have been told that there was no such warranty, either express or implied, as is alleged in the second and third counts of the plaint. There is not, I think, any important difference between those two counts. In the one, the gist is a *promise* by the defendant to the plaintiff, that the rape seed, the subject of the contract, "should be good growing seed, *and* fit for the purpose of sowing and obtaining a crop of rape therefrom:" in the other, the gist is a *warranty* that the seed was "reasonably good "growing seed, *and* fit to be used for the purpose of sowing and of "producing a reasonably good and productive crop." The only real difference between them seems to be this: the one treats the promise as one of the terms of the principal contract of sale itself; the other treats it as a warranty—*i.e.*, a thing collateral to the express object of the contract, though a part of it; according to the distinction taken in *Charter v. Hopkins* (a), and approved in *Stuckly v. Bailey* (b). But the difference is, for the present purpose, quite immaterial.

The plaintiff does not now assert that there was an *express* contract to the effect of those counts; but he says there were facts in proof, from which the law will *imply* such a contract. In order to see whether that is so, the first thing to be done is obviously to inquire what those facts are. It is admitted that they are comprised wholly within the limits of the examination and cross-examination of the defendant's witness Butler; and that the rest of the evidence is, on this point, immaterial. The reason of this appears in the Judge's report; but I need not further refer to it, as it is not in dispute.

The defendant is a seed merchant; and Butler is his book-keeper

(a) 4 M. & W. 404.

(b) 1 H. & C. 415.

E. T. 1865. and salemaster. The whole case lies within the first ten lines of
Common Pleas. Butler's direct examination, and two lines of his cross-examination;
 SHIELDS but of these every word is material:—"I know the plaintiff; he
 v. "came to the defendant's office in Denmark-street, Dublin, on 20th
 CANNON. "of August last (1863). He asked me if we had Dutch rape seed;
 "I said we had, but of last year's importation." Now I pause there.
 The subject of the treaty is now shown not to be a thing to be
 manufactured, or *to be* procured and supplied to order, but a
 product of nature, actually in the merchant's possession at the
 moment, and known by the customer to be so. The question
 was, "*have you* Dutch rape seed?" The answer was, "*we have*,
 of last year's importation:" and the order ultimately given was,
 "send me five stone *of it*." It was a specific order for an article,
 or part of an article, existing in specie, and which could not be
 executed by sending anything else. "Send me five stone of the
 Dutch rape seed which you have of last year's importation." From
 which it results that the buyer had the opportunity, and knew
 he had, of inspecting the article, if he chose to do so. Further-
 more, it appears upon the evidence (though of this it does not
 appear that the plaintiff was apprised) that the residue then left
 of the last year's importation was barely sufficient to supply the
 plaintiff's order, which exhausted the whole of it; so that the
 subject of the contract was actually a specific existing thing, known
 to the buyer to be present, and capable of inspection. Now, a
 party who is about to purchase such an article has three courses
 open to him, one or other of which he may adopt. He may call
 for the article, and exercise his own judgment upon it; or he
 may require an *express* warranty; or he may rely on such re-
 sponsibility as the law will *imply* upon the seller, in the absence
 of either of the two former. Well, in order to see what the
 plaintiff did in this case, I return to the point in Butler's evi-
 dence at which I paused. After the words "we have, of last
 year's importation," it proceeds, "he asked me was it good?" Now
 what is the meaning of "good" here? Good for what? The
 plaintiff's main reliance is on the passage in Butler's cross-ex-
 amination, in which he admits that he knew that the purpose for

which the plaintiff wanted the seed was "for growing." Now, E. T. 1865.
 "growing" must there mean "growing into a crop." It cannot *Common Pleas*
 mean merely sprouting above ground, and then perishing. It *SHIELDS*
 means growing into a fair substantial crop; and that is, as I have *v.*
 shown, the contract averred in the plaint. Therefore, when the *CANNON.*
 plaintiff asks Butler "is it good?" it is very plain that, bearing
 in mind the purpose of the one, and the knowledge of that pur-
 pose by the other, the question must have been put and understood
 in the sense, "is it good for growing a crop?" That is to say,
 the plaintiff asks Butler to give him an express representation
 to the precise effect of the promise or warranty alleged in the
 second and third counts; and if Butler had answered to that
 "it is," you would then have the question fairly raised, whether
 this positive representation, coming from a dealer in the article,
 was tantamount to an express warranty against all defects, whether
 patent or latent. But Butler cautiously avoids giving any such
 answer; his answer is, "I *believe* it to be so." He refuses or
 evades asserting the quality of the article, and, instead of it, affirms
 the belief of his own mind; and the plaintiff rests upon that,
 and gives the order in the terms I have already mentioned.

Upon this evidence, the first question which arises is, whether
 there is an *express* contract or warranty upon the same subject
 upon which the plaintiff seeks to raise a warranty *by implication*
of law, in the terms laid in the second and third counts of the
 plaint—*i. e.*, upon the goodness of the seed for the purpose of
 growing a crop; for, if there *be* such express contract or warranty,
 it is clear that there can be no *implication* of another and different
 contract or warranty on the very same subject. This is a propo-
 sition so elementary as scarcely to need authority; but there is the
 most express authority for it: *Dickson v. Tezinia* (a); *Budd v.*
Fairmaner (b); *Pindar v. Button* (c). Well, then, is there in this
 contract an express term regarding the goodness of the seed for grow-
 ing a crop? Plainly there is. In a case of this kind, where there is

(a) 10 C. B. 602.

(b) 8 Bing. 48.

(c) 11 Weekly Rep. 25; S. C., 7 Law T., N. S. 269.

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no writing, you must collect the contract from the considered words of the parties. The plaintiff asks for an express assurance on the point: Butler guardedly refuses or evades giving it; but gives instead an assurance of his belief; and the plaintiff abstains from pressing the matter further, and thereupon orders the article. That is to say, on this point of latent natural quality, the seller declines to pledge more than his belief; but *that* he does pledge, and that partial pledge the buyer accepts. If it could be proved that that pledge was false—that is to say, that Butler knew the seed was unfit to grow a crop,—an action would lie against him, mark, not merely on a count *in tort* for deceit, but *on a count in contract*. *Wood v. Smith* (a) is an express authority for that. That is a clear authority that, if there had been in this plaint a count for a warranty of belief, the evidence would have proved that such a warranty was made in fact; and if the plaintiff could have further proved that Butler knew of the defect, he must have got a verdict on that count. The case is therefore a precise authority that what was said in this case constituted a *qualified* warranty, and on the very point of the fitness of the seed. But what the plaintiff seeks to do is to add to that, by implication of law, a *general* warranty on the very same subject. There cannot be any such implication. The express contract excludes it; and the express contract has not been broken. The jury should, in my opinion, have been told that the express warranty in proof excluded the implied one alleged, and that therefore their verdict must be for the defendant.

If I be right in this, the question principally argued in the case does not arise at all. But, as that is not the opinion of the majority of the Court, I do not think I ought to refrain from expressing my views upon the latter question.

Assume, then, that the dialogue, as to the goodness of the seed, were wiped out of the case—exclude further the fact that the order was for a specific thing, or part of a specific thing, then in the seller's possession, and open for inspection,—in short, suppose the case were simply this, that the plaintiff walked into the shop of the

(a) 4 Car. & P. 45; S. C., M. & R. 124.

seed merchant, and ordered five stone of Dutch rape seed, his purpose being to sow it for a crop, and the merchant knowing that such was his purpose,—does the law, upon these facts, imply a warranty, or, to speak more accurately, a term in the contract, that the seed to be supplied shall be good growing seed, and fit for producing a reasonable crop; so as that, if the crop fail through some defect in the seed, though latent and unknown, the merchant shall be responsible? It is plain that it does not make the slightest difference in the question whether the badness of the seed was so radical that not a grain of it ever came up at all, or whether it was only such that, though every grain germinated, the crop failed before reaching maturity. In the one case, as well as the other, a contract, such as laid in the second and third counts of the plaint, would be broken.

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Now it is necessary, in the first place, to have a clear understanding of the conditions under which the question is before us. It is plain, having regard to the evidence, and to the question left to the jury, that Dutch rape seed fit for growing must be assumed to be, as it was throughout the argument assumed to be, a purely natural product, with no alloy at all of manufacture or of human skill. If the qualities which cause it to germinate were not purely those of nature's own imparting, but were more or less contributed by human art, evidence of that should have been given at the trial; and it would thereupon at once have become a question for evidence on both sides, whether, on the one hand, the defect were in the artificial treatment (as was proved in evidence in the case of *Jones v. Bright*), or, on the other, in the raw material itself (as was proved in *Bluett v. Osborne*): and the attention of the jury should be expressly directed to the distinction. But no such evidence was given by the plaintiff. The defendant himself, and Mr. Mackey, an eminent seed merchant, were examined for the defendant, and no question was put to them on cross-examination as to the growing qualities of seed being in any degree owing to, or even improvable by, human art. On the contrary, when the defendant's Counsel asked Mr. Mackey what was his opinion, upon the entire evidence, as to the cause of the

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failure of the crop, which, if he had been allowed to answer it, *might have* elicited something on this very point, if there were anything at all in it, the question was at once objected to by plaintiff's Counsel, and withdrawn; and, accordingly, the Judge did not leave, and could not have left, any question of the kind for the jury. He simply laid down for their guidance a general proposition of law, perfectly correct as a *general* proposition; and the sole question is the one which was alone argued, namely, whether that general proposition is true as applied to a purely natural product,—which seed must be taken to be, in the absence of evidence to the contrary. That is the question which was raised below, and which was argued at the Bar; and we really cannot escape from the decision of it by ourselves arbitrarily importing fanciful considerations, which have no existence in evidence, which were therefore not put to the jury, which were therefore most properly not argued by Counsel, and of which we cannot take judicial notice, if they exist at all; as to which I, for one, know nothing, and have my own suspicions that we are all here upon a common level of ignorance. I proceed therefore to consider the question on which our decision has been called for.

The plaintiff's Counsel assert that it is a general proposition of law that, whenever a dealer executes an order for an article in the way of his trade, which the buyer has had no opportunity of inspecting, and which has been ordered, or is known to be wanted, for a particular purpose, the law implies a warranty or contract that the article, when furnished, shall be reasonably fit and proper for that purpose; and undoubtedly case after case, and text-book after text-book, can be, and have been, cited, in which such a rule has been laid down. The defendant's Counsel, on the other hand, assert, and no doubt with equal correctness, that in every instance in which that rule has as yet been applied the subject of the contract was, in the whole or in part, a manufactured article; and the qualities, for the absence of which the seller was held responsible, were subjects of human skill and creation; but that in no case yet has the rule been applied to hidden defects in a purely natural product. This the plaintiff's

Counsel admit; and moreover they are obliged to admit, that in the leading case of *Jones v. Bright*, the rule laid down in which, by Best, C. J., they adopt, and properly so, as the original text of the law on this subject, the rule is in terms confined to manufactured articles; and indeed no one can read the elaborate judgment in that case, especially as reported in 3 *M. & P.*, without being struck by the almost anxiety with which the reasoning is shaped and restricted to that class of articles. But the plaintiff's Counsel assert that this qualification, though admitted to lie thus at the very root of the doctrine they rely on, has disappeared in the subsequent progress of the law. They say that since *Jones v. Bright* was decided, the rule has been applied to cases which are in principle undistinguishable from the present; so that a decision in their favour would be, although a new decision, yet new in immaterial accidents, rather than in essential difference.

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The way in which Mr. *Tandy*, in his able and candid reply, endeavoured to work that out was this:—he says that it was not until after *Jones v. Bright* was decided, that it was settled that the seller of a manufactured article, of which he is not himself the manufacturer, has the same liability cast on him by law which *Jones v. Bright* decided would rest on the manufacturer himself if he were the seller. But, he says, the moment that later decision was made, the distinction so much dwelt on in *Jones v. Bright* lost all its significance, for there is no difference at all, he says, between making a man responsible for latent defect in a product of human art not manufactured by himself, and making him responsible for latent defect in a product of nature; and that, therefore, while the rule laid down in *Jones v. Bright* remains in full force, and forms the main stay of the plaintiff's argument, the reasoning by which the application of that rule was so carefully restricted by those who laid it down has lost all its value. Now, so far is this from being the case, that, according to my understanding, the restrictive reasoning in *Jones v. Bright* applies with undiminished force to the cases which have been subsequently brought within its rule. These decisions were but the necessary and inevitable sequence of the decision in *Jones v. Bright*. Chief Justice Best makes no

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distinction whatever between the maker and the seller of a manufactured article; on the contrary, in the very first sentence of his judgment, he puts both in the same category, for he speaks of "manufacturers and those who sell." If the manufacturer is bound to warrant the existence of the qualities which he professes to import, surely the dealer, who buys from him for the purpose of selling over again, must incur the same responsibility, bound as he is to satisfy himself of the existence of those qualities in which he professes to be skilled, and having his remedy over against the manufacturer if he should be made responsible for their absence. The difference between the manufacturer and the ordinary dealer in such articles is one of the merest detail. But between all those cases on the one side, and the case of a merely natural product on the other, there is a distinction so broad, so vital, so generic, that the mind feels at once intuitively that it has passed, so to speak, from the things of one world to those of another. In the former, man is, by implication of law, made responsible for things of man's creation; in the other, he would, by *implication of law*, be made responsible for the hidden mysteries of nature. Why, in the absence of any special contract, should responsibility so portentous be imposed? It is right and reasonable that the human creator should be held responsible for the existence of the qualities which he professes to create, and that all who deal for profit in things of human creation should be responsible for what lies within human skill and ken. But on what principle can a man be called on, against his will, to answer for the inscrutable secrets of nature? Who can foretell whether seed will grow; or, still more, whether it will produce a crop? As Cockburn, C. J., says, in 7 *Law T., N. S.*, p. 269:—"No one can tell before seed is sown if it will grow." In this case it appears on the evidence that the defendant had, a month or two before the sale to the plaintiff, actually subjected a part of the seed to an experiment. He sowed it in a flower-pot, and it grew. And yet a few weeks after, seed from the very same bag, when sown in the plaintiff's land, utterly failed, not, as on the verdict we must assume, from any fault in the land or the treatment, but from some undiscoverable defect in the seed. Pos-

sibly it may come to pass hereafter, in the progress of science, that men can look into the springs of nature as one can now into those of a watch or a steam engine, but as yet no one short of a clairvoyant can have the pretension to do so. If a buyer wants this security, a life insurance as it were upon the seed, let him ask for it expressly, and pay for it, as no doubt he would be required to do in the shape of an increased price. But this is not all. It is not merely that the plaintiff's contention is without authority and contrary to principle, but it is directly opposed to express authority. I will not dwell on the case of *Parkinson v. Lee* (a), though I think its bearing on this question has not been done justice to by the Counsel on either side. I have already adverted to the admitted fact, that the reasoning in *Jones v. Bright* expressly excludes such a case as this. In the latest case on the subject, so much relied on by the plaintiff, the case in 7 *H. & N.*, Chief Justice Cockburn makes it one of the grounds of his decision, that "there is no difference in this respect between goods to be manufactured and provisions to be supplied. It can make no difference that the seller is not the manufacturer." But the cases which, in my mind, are decisive are those on warranties of horses. This case has been twice argued, and I have heard no even intelligible ground suggested for taking the case out of the principle of those. A man goes to a dealer in horses and buys from him a horse, without any express warranty, and without saying anything as to any special purpose. Well, the dealer knows, at all events, that the horse is wanted to be a beast of burden; but he may or may not have some natural unsoundness which may make him utterly unfit for that purpose: yet it is clearly settled that the law implies no warranty of soundness. But, suppose the customer asks for a horse specially for one of those purposes for which horses are fitted by skilled training, with respect to which therefore the trained horse is partially a manufactured article—as, for example, if he ask for a carriage horse, or a horse fit to carry a lady—then the law implies a warranty of the possession of the qualities imparted by training; and if a horse be given which wants those particular

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qualities, however perfect for some other purpose, the seller is responsible. But Sergeant *Armstrong* put a case which draws the test still closer. Suppose he asks for a horse for some special purpose for which nature is everything and training nothing—*e. g.*, for a sire. A stallion is given him externally perfect; one perhaps to whom foals have been already born. Yet it turns out that, from some mysterious hidden cause, there is now a total absence of the generative quality. Is this dealer answerable for that? Clearly not. Now there are most pointed illustrations of the difference the law makes, on the doctrine in question, between latent defects in manufacture and in nature. What is the difference in this respect between horses and seed? Is the loss of generative quality in seed more easy to detect or predict than the loss of the generative quality or of soundness in animals? How can this case be decided for the plaintiff without discrediting the settled distinction in the case of horses? It is vain to say, as I heard it said, that those cases can be distinguished on the ground that a horse is a specific chattel. Surely the natural horse, as to whose *soundness* the law will *not* imply a warranty, is not more a specific chattel than the trained horse, of whose *training* the law *will* imply a warranty. Is it not futile to suggest, as the reason of the distinction, an element which is common to both? And is it not more natural to seek it in that in which alone they differ—namely, that the thing which *will* be warranted is a thing of man's making, whilst the thing which will *not* be warranted is a thing of nature's making. Again, contrast the two cases of *Jones v. Bright* (a) and *Bluett v. Osborne* (b). The former, a case of copper sheathing for a ship, and express evidence given at the trial that the failure was caused by oversight or casualty in the manufacture; the latter a case of a ship's bowsprit, and evidence that the failure was owing, not to defect in manufacture, but to a latent defect in the timber itself. And in the former, the seller was held liable on an implied warranty, and in the latter, *not* liable. See the latter case explained by Best, C. J. (c), and contrasted with the case before

(a) 5 Bing. 533.

(b) 1 Stark. 354.

(c) 5 Bing. 544.

him. Surely, after this and the horse cases, one might have supposed that it was reasonably well settled, if anything can ever be considered settled, that the exception which *Jones v. Bright* established out of what is the general rule of the English Law of Contracts—namely, "*caveat emptor*"—is confined to manufactured articles, or, in the case of mixed articles, to those qualities only which are imparted by manufacture, but has no application to qualities for which nature alone is responsible. It was not pretended at the trial, or in the argument of this case, that the qualities for want of which the seed failed were other than purely natural. Any such suggestion would be purely chimerical; and the consequence is that, even assuming the evidence to bear the colour which the plaintiff's Counsel put upon it (that is to say, rejecting the point I first dwelt upon), my opinion is, that the law will not, from the facts in proof, imply any such contract as that alleged in the second and third counts of this plaint.

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KEOGH, J., concurred with O'HAGAN, J.

MONAHAN, C. J.

I concur with my Brothers KEOGH and O'HAGAN, that the plaintiff should retain his verdict.

I think, in cases of this kind, it is a matter of the utmost importance that some general rule should be established by which the profession may be guided in advising those who consult them; and if we find a general rule laid down on any subject, I do not think we should cast about for subtile distinctions to take any particular case out of that general rule.

Now we find this general rule laid down by Cockburn, C. J., in the case of *Bigge v. Parkinson* (a):—"The principle of law is correctly stated in the passage cited from *Chitty on Contracts*. "Where a buyer buys a specific article, the maxim *caveat emptor* applies; but where the buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose."

(a) 7 H. & N. 961.

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No one questions but that this case comes within that general rule, at least, in the words in which it is laid down.

The defendant here is a dealer in seeds; and the plaintiff, to the knowledge of the dealer, wants seed for a particular purpose. The article is not produced for the inspection of the purchaser; it is not seen by him; and he exercises no judgment or discretion in the matter; he merely asks if the defendant has Dutch rape seed, and is answered that he has, but of last year's importation; he then inquires if it is good, and the defendant replies that he believes it to be so. The defendant's clerk admits that he knew that the seed was purchased for the purpose of being sown. And unless there be something in the nature of the thing sold which prevents the general rule applying, what occurred in this case at the time of the sale would raise an implied warranty that the seed was reasonably fit for sowing; not that it would produce a crop—for that must depend on many circumstances, such as proper treatment and cultivation, and a favourable season,—but that at the time of the sale it was reasonably fit for the purpose for which it was bought.

But it is said that, though this case comes within the terms of the general rule, there is something in the nature of the article itself, viz., seed bought for the purpose of being sown, which excludes the general rule. I deny altogether the existence of any such exception; nor are there any grounds for it. The defendant himself at the trial gave evidence to show that he had the means of testing the germinating qualities of this seed, and had in fact done so; and any one who has had experience in cases of this kind must know that, before selling seed for the purpose of being sown, the merchant generally tests it, and sells on the strength of the knowledge which he derives from that experiment. The defendant's argument is, that the general rule does not apply to natural products, and especially in this case, on account of the inscrutable nature of the germinating quality of seed; and he says that no case has been decided in which the rule has been extended to natural products. I can only say, if there has been no decision on the subject, it is time there should be one.

Two cases have been referred to by the defendant, namely, *Parkinson v. Lee* (a), and *Bluett v. Osborne* (b), in which it was held

(a) 2 East, 314.

(b) 1 Starkie, 384.

that there was no implied warranty. But what are the facts of those cases? In *Parkinson v. Lee* the article sold was a quantity of hops, which it was alleged the defendant had guaranteed to be good, sound, and merchantable. The hops were sold by sample; and at the time they were purchased, the bulk fairly answered the sample; but it appeared that, owing to the grower having improperly watered the hops before he had sold them to the defendant, they became heated in the plaintiff's warehouse, and turned out valueless. In the other case of *Bluett v. Osborne*, the article sold was a bowsprit, which, after it was bought, was found to be rotten at the core. Both these cases are observed on by Tindal, C. J., in the case of *Shepherd v. Pybus (a)*; and both are put by him on their true ground. At page 880 he says, speaking of *Parkinson v. Lee*,—"But, if the reasons given by Grose, J., and Lawrence, J., be examined, their opinions will not be found to affect the question now before the Court; for they both lay great stress upon the fact that the seller was not the grower of the hops, and that the purchaser, by the inspection of the sample, had as full an opportunity of judging of the quality of the hops as the seller himself. And in the case of *Bluett v. Osborne*, although Lord Ellenborough held that the vendor was not responsible for the latent defect in the bowsprit, which, upon being cut, proved to be rotten in the core, yet he expressly states his opinion, that a person who sells, impliedly warrants that the thing sold shall answer the purpose for which it is bought. And the decision of that case is consistent with that principle, when qualified by the reasons given in *Parkinson v. Lee*; for in both cases the purchaser had as full an opportunity of judging of the quality of the articles purchased as the seller himself." On these grounds, as stated by Chief Justice Tindal, I think the two cases referred to are clearly distinguishable from the present; for in both the articles were specific; and the purchaser had as full an opportunity of judging of the quality of the article sold as the seller himself.

In the case before us, it has been suggested by the plaintiff that it does not necessarily follow that the failure of the crop

E. T. 1865.

Common Pleas.

SHIELDS
v.

CANNON.

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arose from an original want of germinating power in the seed, but that in all probability it was caused by some bad treatment which it had received in the stores of the defendant; for it is well known that seed intended to be used for the purpose of being sown, and producing a crop, requires to be treated with the greatest care; and any want of attention in that respect is likely to be attended with a failure of the crop. I think there is some reason in that suggestion; and it does not occur to me to be a matter on which evidence was required. It is, I believe, known to every one, that if seed becomes for any reason heated, it loses, to a great extent, the germinating power. If that suggestion be adopted, it will go far, in the present case, to do away with the distinction which has been attempted to be drawn between natural products and manufactured articles; to the latter of which there is no question but that the general rule applies.

I admit that this case is, to some extent, new in its particular facts, and that Cockburn, C. J., in the last case on the subject, namely, *Pindar v. Button* (a), says that the point has not yet arisen, and that he reserves the decision of the question until the case arises. But the case has now arisen; and in my opinion we should hold that it comes within the general rule I have stated, namely, that there was an implied warranty that the seed sold was fit for sowing. The defendant, however, insists that, as there was an express warranty, there cannot be an implied one. I adopt the observations of my Brother O'HAGAN on this point; and I think that, if there was an express warranty in this case, it was one totally different from the implied one. The latter was, that the seed was reasonably fit to be committed to the earth, and from which a reasonable crop might be expected; the express warranty (if any such existed) was, that the defendant believed the seed to be good.

On the whole, therefore, I am of opinion that the plaintiff should retain his verdict: if he prefers to enter it on the third count rather than on the second, he may do so; it will be for him to consider on which he will take his verdict.

(a) 11 W. R. 25.

APPENDIX.

GRIFFITHS v. SLATOR.*

(Queen's Bench.)

M. T. 1865.

Queen's Bench

Nov. 21.

THIS was a motion that the plaintiff should be compelled to give security for costs. The summons and plaint in this action (which was in the usual form) complained that the defendant was indebted to the plaintiff in the sum of £44. 14s. 5d., and was *dated* the 21st of September. On the 15th of November the defendant obtained from the Court an extension of his time for pleading, and on the same day served notice on the plaintiff, calling upon him to give security for costs, on the ground that he resided out of the jurisdiction of the Court, and had no property within the said jurisdiction. This the plaintiff refused to do, on the ground that the defendant, by obtaining an extension of his time for pleading, had waived his right to security.

Obtaining an extension of time to plead is no waiver of the right to obtain security for costs.

Dowse (with him *S. M. Grier*), in support of the motion, referred to *Clarke v. Riordan* (a) and *Stewart v. Ballance* (b).

Devitt, contra, contended that there had been a waiver, and cited the cases of *Leckham v. Gresham* (c) and *Beausang v. Condon* (d).

Per Curiam.

This motion must be granted. With regard to the effect of obtaining an extension of time for pleading upon the right of obtaining security for costs, we are of opinion that it is no waiver of such right. If we thought that this motion was made for the purpose of harrassing and delaying the plaintiff, we should refuse it. In this case it appears to have been made with perfect *bona fides*. There is no such principle as that obtaining an extension of time to

(a) 9 Ir. Com. Law Rep., App. xxxiv.

(b) 10 Ir. Com. Law Rep., App. i. (c) 2 Ir. Com. Law Rep. 139.

(d) 13 Ir. Com. Law Rep., App. xxxvii.

* Before the Full Court.

[Note.—This case is reported by D. H. MADDEN, Esq., Barrister-at-Law.]

M. T. 1861.
Queen's Bench
 GRIFFITHS
 v.
 SLATOR.

plead amounts to a waiver of the right to obtain security for costs. The application must be granted; the defendant taking short notice of trial, and all further proceedings being stayed until security for costs has been given by the plaintiff.

REGINA v. CLEARY.*

Nov. 22.

On a bail motion, the Court will look at an information that has been taken in the prisoner's absence.

WATERS now made an application, which had stood over from the 20th instant, to have the prisoner admitted to bail. The charge was treason-felony; and this application stood over from the previous day to enable the prisoner's Counsel to peruse some of the depositions—those of A. Kennedy—relied on by the Crown, and which had not been furnished with the other documents to the prisoner's solicitor. These had since been furnished, and it now appeared that the prisoner had been committed for trial in Dublin, on the 18th of October, while the depositions in question were sworn at Nenagh, one on the 21st, and the other on the 28th of October. Counsel contended that these were not depositions included in the preliminary order by which the Court required the informations to be returned; and they could not be used on this motion against the prisoner; they could not be used as evidence in case of the witness's death: 14 & 15 *Vic.*, c. 93, s. 14.—[HAYES, J. This is a bail motion, and affidavits may be used on it.]—Yes, if these were ordinary affidavits sworn to oppose the motion, and entitled in the matter. They have been taken in the prisoner's absence, and are now used to affix guilt on the prisoner.—[FITZGERALD, J. You must go the length of saying that the Magistrate had no authority to swear the deponent.]—*Regina v. Watts (a)*.—[LEFROY, C. J. That was a case upon the taking of depositions. The Court cannot yield to that objection.]—Well, it appears from the documents that the deponent A. Kennedy had retracted his first information, and denied its truth: will the Court still act upon it?—[LEFROY, C. J. The Court will, in considering the depositions, keep that fact in view. We must refuse this application. It would be a most mischievous principle to establish on such a motion, to allow a

(a) 9 Cox Cr. C. 13.

* Before the Full Court.

party who had made an information to do away with the effect of it. *Prima facie* his first information is evidence, and no circumstances are alleged like failure of memory, or anything of that kind, to explain the party's retracting it.]

M. T. 1865.
Queen's Bench
REGINA
v.
CLEARY.

Per Curiam.—We refuse the application.

M'MOROGH

v.

HUGH KEARNEY, MARY KEARNEY, and others.*

Nov. 23.

SNEEDS moved to set aside the defence of Mary Kearney, one of the defendants, as filed contrary to the 3rd General Order of 1856, after the time allowed had expired.

Defence filed after time for pleading expired. The Court will allow the defence to stand, if a case be made, such as on an original application would induce the Court to let defendant in to plead.

The summons and plaint was in ejectment, and had been filed on the 24th of June last, a copy having been served on the defendant M. Kearney on the 17th of June. This defendant should have therefore filed her defence on or before the 3rd of July, but omitted to do so until the 27th of October.—[O'BRIEN, J. Why did you not apply before?—The time of one of the other defendants for filing defence only expired recently.

P. J. Hamilton, contra.

Even if Mary Kearney had lapsed her time to plead, the Court would, on a proper affidavit, let her in to plead. Such an affidavit had now been made, by which the defendant made out a title paramount to the plaintiff's, and why take the defence off the file now?

Per Curiam.—Allow the defence to stand.

* *Coram* O'BRIEN, HAYES, and FITZGERALD, JJ.

H. T. 1866.

Queen's Bench

Jan. 20.

CUFFE v. WILSON.*

Inspection of documents.

The plaint in this action was for breach of agreement relating to the sale of sheep, for ready money. The defendant, filed an affidavit, denying that there was any agreement whatever, but stating that he had on one occasion written a letter to the plaintiff relating to a sale on credit; that he had no copy thereof, and had seen none since the writing, and that it was necessary for his defence to see said letter, and applied for an order to inspect and take a copy thereof. *Held*, that he was entitled to such an order notwithstanding his denial of the contract.

THIS was a motion for liberty to inspect and take a copy of a document in the plaintiff's possession. The plaint alleged a contract for the purchase of sheep for ready money, and the breach thereof by the defendant's refusing to pay for the said sheep, and the damages were laid at £84. The defendant's affidavit, on which this motion was grounded, stated that there was no foundation whatever for the agreement, bargain, or arrangement alleged in the plaint. That he had a good defence on the merits. That he had had some negotiation with the plaintiff about sheep, and that defendant, on one occasion, wrote a document and gave it to said Joseph Cuffe, and the affidavit continued:—"And I say I did not keep any copy, and have no copy of the said document, nor have seen any copy of it since I gave the same to the said Cuffe; but I say that, to the best of my recollection, the said document was a proposal by me to buy the said sheep on credit, and to give my bill, and to deposit the lease of my farm-house as a security, on the terms of my being given possession of said sheep at once. I say that I do not recollect the precise terms of the document, but that the only proposal I ever intended to make, or ever discussed with the said J. Cuffe, was a proposal to the effect above stated; and I say that if the document does not fully set out the same, it was only through inadvertence and mistake." The affidavit further stated, that it was necessary for the defence to get a copy of this proposal, and that a preliminary application had been made without effect to plaintiff's solicitor.

James Monahan.—From the statement in the plaint, there must have been a writing to make the contract binding, and this must be the document. Where there was a contract in writing, and that in the possession of one of the parties, the other party was entitled to see it: *Price v. Harrison* (a); *Bull v. Clark* (b).

Harty, contra. The defendant alleges that this is necessary for his defence, but he swears that there is no foundation for the allegation of a contract. The cases cited on the other side apply where a contract is admitted between the parties: but here it is denied that there was any agreement whatever: when it appears that one party intends to rely upon an instrument, then the other is entitled

(a) 8 C. B., N. S., 617.

(b) 15 C. B., N. S. 851.

* *Coram* O'BRIEN, J.

to see, it under the 64th section of the Common Law Procedure Act 1853; but here the decision in *Shadwell v. Shadwell* (a) applies.

H. T. 1866.
Queen's Bench

CUFFE

v.

WILSON.

O'BRIEN, J.

Take the order. The plaintiff was, perhaps, justified in coming here by the case of *Shadwell v. Shadwell*. Both parties costs to be costs in the cause.

(a) 28 Law J., N. S., C. P. 275.

SMITH v. CRAIG.*

M. V. 1866.
Jan. 5.

Interpleader.

THE plaintiff in this case, having obtained judgment by consent for £62, proceeded to issue execution thereon, and seized certain goods under said execution, on the 20th December 1865. On the following day, one Davis served notice on the Sheriff, claiming to be owner of the said goods under a bill of sale executed February 1865. The Sheriff having obtained the usual interpleader order, on the 23rd December, the parties now appeared.

Claimant under bill of sale must give the execution creditor an opportunity of examining his claim before requiring the execution creditor to say if he will accept an issue.

Lane, for the Sheriff.

Falkner, for the claimant Davis, asked the Court to direct the execution creditor to accept an issue or abandon the seizure.

Whittle, for the execution creditor, objected that no affidavit on behalf of Davis had been served on the execution creditor, and that the latter ought not to be called on to accept an issue without knowing what the claim was.

Falkner stated that an affidavit had been filed on behalf of Davis, and served on the Sheriff, and urged that Davis need not have made an affidavit at all.

HAYES, J.

The execution creditor should have an opportunity of examining the claimant's affidavit. Let the matter stand over till the affidavit has been served on the execution creditor.†

* In Chamber, before HAYES, J.

† See Chitty's Archbold's Practice, p. 1320.

H. T. 1864.
Exchequer.

KING v. WILLIAMS.

(*Exchequer.*)

Jan. 11.

The 75th section of the Landlord and Tenant Amendment Act 1860, applies only where the tenant's interest has absolutely determined.

W. GAMBLE moved that the defendant, in an action of ejectment for a forfeiture, by reason of sub-letting contrary to a clause against same in the lease, be compelled to give security for costs, pursuant to the 75th section of the 23 & 24 Vic., c. 154. The notice required by that section had been duly served.

The LORD CHIEF BARON.

This motion must be refused. The 75th section of the 23 & 24 Vic., c. 154, is an exact re-enactment of the 1 G. 4, c. 87, which never was held to apply to cases where the termination of the tenancy was, or could be, disputed. It applied only when the tenant's interest had plainly and unequivocally expired.

Motion refused.

HUGHES v. SHIRLEY.*

H. V. 1866.
Consol. Cham.
 Feb. 13.

(*Consolidated Chamber.*)

The Court will not order a jury to be struck under the old system, unless it is shown that such jury will be likely to be more fair and impartial than one struck in the ordinary way.

THIS was an action for libel, at the suit of a Roman Catholic clergyman of the county of Monaghan, against a landowner in the same county. The alleged libel had reference to the conduct of the plaintiff at Carrickmacross in the said county, at the last election for the county. There were several defences pleaded, and amongst them one of justification. The venue was laid in Louth, and the defendant now moved to have a jury struck under the old system. The defendant's land agent had sworn an affidavit, stating that he had seen a copy of the special jury panel of said county for last year, and that he knew most of the special jurors named therein by character; that party-feeling was very high in the county of Louth, which was the scene last year of two contested elections, and another election for said county would shortly take place; "and defendant verily believes that many of the jurors of said county, both "special and common, have very strong feelings upon political

* *Coram* DEASY, B.

"matters, of which it will be nearly impossible for them to divest their minds at the trial of this action, particularly as political affairs and matters relating to a contested election must be largely discussed at the trial; that Carrickmacross is more connected by trade and general intercourse with Dundalk than with any town in the county of Monaghan; that the matter was discussed within the county of Louth, and by the gentlemen on the special jury panel; and the said election excited nearly as much interest in the county of Louth as did the election for the said county of Louth itself; that a large number of the inhabitants of Louth took part in the said election for Monaghan."

H. V. 1866.
Consol. Cham.

HUGHES
v.
SHIRLEY.

Hemphill, with him *Falkner*, cited *M'Lester v. Fagan* (a), and urged that Louth being the smallest county in Ireland, made it more difficult to choose a jury.

Harrison, with him *Hamill*, cited *Harrison v. Lynch* (b). The defendant only refers to the panel of last year; he does not allege any objection to the actual panel. In *M'Lester v. Fagan*, the reference was to the present state of the jury panel. The affidavit filed in behalf of the plaintiff states that the present jury panel contains sixty-four names of gentlemen, only twenty-four of whom are Roman Catholics. There is nothing to show that these are not a fair exponent of the county, or that the method the defendant wants to have adopted will supply any defect.

Falkner, in reply.

If this relief was only to be given in reference to the state of the panel for the county Assizes, then the possibility of giving it would depend on an accident, as the defendant could only know the state of the panel in time in certain cases, according to the time the Circuit went out. *Barron v. West of England Insurance Co.* (c) shows that where the venue is laid in a small county, the Judge will consider that fact in dealing with this application.

DEASY, B.

I don't see that there is any probability that by granting this motion I could contribute in the smallest degree to the object sought. When the party wants to depart from the ordinary method he must show that he is likely to mend his chances of getting a fair trial. The application must be refused.

(a) 9 Ir. Com. Law Rep. App. xlv. (b) 3 Ir. Com. Law Rep. 256.
(c) 3 Ir. Com. Law Rep. 112.

H. T. 1866.
Common Pleas.

MEEHAN v. DUANE.*

(*Common Pleas.*)

Jan. 19.

The notice prescribed by the 23 & 24 Vic., c. 154, s. 75, calling upon the defendant to give security for costs, must be at foot of the summons and plaint, and on the same paper.

EJECTMENT FOR OVERHOLDING.—*Carson*, for the plaintiff, moved, under the 75th section of the Landlord and Tenant Law Amendment Act (Ireland) 1860, that the defendant should be ordered to give security for costs, damages, and mesne profits, the interest in his lease having expired by effluxion of time.

T. P. Lynch, contra.

There is a preliminary objection to this motion, which will prevent it from being maintained. The words of the Act are, "It shall be "lawful for him" (the landlord) "*at foot* of the summons and plaint "to address a notice," &c. &c. In this case the notice was merely pinned to the summons and plaint, which is not a compliance with the requirements of the section. The Wills Act requires a testator's signature to be at foot of the will; and surely it would not be sufficient for him to write his name upon a separate piece of paper, and pin it to the will. I really must apply for costs in this case. A similar motion was made by the very same party last Term, and refused, on the ground that the notice was not at the foot of the summons and plaint, it having been in fact upon a separate piece of paper: that was without costs. That action has been discontinued, a new writ served, and yet the notice for the present motion is defective in a precisely similar manner. Under those circumstances, I submit that the defendant is entitled to the costs of this motion.

Motion refused with costs.

* *Coram* MONAHAN, C. J., CHRISTIAN and O'HAGAN, JJ.

M. T. 1865.
Common Pleas.

CHUTE v. BLENNERHASSET.

(*Common Pleas*).

THIS was a motion by the plaintiff in an action for breach of promise of marriage, for the inspection of, and copies of, the plaintiff's letters to the defendant, with reference to the alleged treaty of marriage. The action was brought by Miss Rowena Chute against Mr. John Du Bouley Blennerhasset; and the defence was a simple traverse of the promise. The notice of motion was as follows:—"That the defendant may be ordered to permit the plaintiff, or her attorney, to inspect all the letters of the plaintiff in the possession or procurement of the defendant; and also, that the defendant may be ordered to furnish copies of the said letters to the plaintiff's attorney, on being paid the usual scrivenery charges for the same; or that the plaintiff, or her attorney, may be permitted to have copies made of the same, the plaintiff undertaking to permit the defendant to inspect all letters of his in her possession or procurement, or to give copies thereof in like manner as above mentioned; which motion will be grounded," &c. The affidavit of plaintiff stated, "that the action in this cause has been instituted for the recovery of damages for the breach of the defendant's promise to marry the plaintiff; and that the only defence filed in this cause is a denial of the engagement entered into between the plaintiff and the defendant; that she intends to proceed to a trial of the cause during the After-sittings of the present Term; that the defendant proposed, in the month of May last, to marry this deponent, who then accepted the said proposal; that it was arranged between this deponent and the defendant that the marriage should take place in the city of Limerick, in the month of July last; and the deponent went to the city of Limerick, for the purpose of making some arrangement preliminary thereto, on the 22nd day of June last, and on her return from Limerick she wrote to the defendant, who was then in the city of Dublin, mentioning what had occurred, and referring to the said intended marriage; that she wrote a letter on the 20th of June last, as she now best recollects, addressed to the defendant who was then at Edenburn, near Tralee, in the county of Kerry, in reference to the intended marriage; that on the 2nd day of July last she wrote to the defendant, who was then at Edenburn aforesaid, and inclosed him a letter written by the Rev. Mr. Meredith, a clergy-

In an action for breach of promise of marriage, to which the defence is a simple denial of the promise, the Court will, on motion of the plaintiff, direct an inspection of, and interchange of, copies of the letters which have passed between the parties.

M. T. 1865.

Common Pleas.

CHUTE

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HASSET.

"man of Limerick, addressed to deponent's mother, informing her
 "that there were certain difficulties in the way of deponent ob-
 "taining license for marrying in that city, and on the same day
 "deponent received, in reply, a letter from the defendant, in which
 "he states, 'the best plan is for me to go to Limerick too on
 "Monday or Tuesday next,' and in which he also states that he
 "had given notice to Mr. Stuart—meaning, as deponent believes,
 "the Rev. Mr. Stuart, one of the clergymen of St. George's parish
 "in Dublin; that on the 3rd day of July last, deponent's mother
 "proceeded from the house at Tralee to the city of Limerick, and,
 "in pursuance of an arrangement with the defendant, this deponent
 "proceeded to Limerick on the 5th day of July, in order that the
 "marriage might be celebrated in that city, and, on the 6th and 9th
 "days of July last, deponent wrote from Limerick to the defendant,
 "who was then residing at Edenburn, relating to the intended
 "marriage, and on the 10th of July deponent, while in Limerick,
 "received a letter, written by the defendant, from Edenburn, and
 "dated July 9th, 1865, being the last letter that deponent ever re-
 "ceived from the defendant; that she believes that in answer to a
 "letter written by deponent's attorney to the defendant, previously to
 "instituting this action, deponent's attorney, in the month of July
 "last, received a letter from the defendant, which letter the deponent
 "has read, and believes to be in the handwriting of the defendant,
 "and in which the following passage occurs:—'I, however, think
 "'it fair to state, that, in the event of your instituting proceedings
 "'against me, I have documents in your client's handwriting which
 "'I am correctly advised would certainly cause her case to fail;'
 "that in addition to the letters hereinbefore specially referred to,
 "she wrote several other letters to the defendant subsequently to
 "their said engagement of marriage, but she cannot remember the
 "dates or precise contents of such letters, and she has not copies of
 "any of the letters written by her to the defendant, but deponent
 "says that she believes the same referred to the existence of the
 "said engagement, and deponent is apprehensive that a portion
 "only of her letters to the defendant may be offered in evidence on
 "the trial; and she is advised, and believes it is necessary and
 "essential to the support of her case, that she should be furnished
 "with copies of the letters so written by her to the defendant, as
 "the evidence to support her case will, in a great measure, depend
 "upon the correspondence between deponent and the defendant; and
 "defendant's letters will be more fully understood when read in
 "conjunction with the letters written by deponent to the defendant.
 "Sworn," &c.

There was no affidavit made on the part of the defendant.

M. T. 1865.
Common Pleas.

Sergeant *Armstrong* (with him *Whiteside, Butt, and William Hickson*) now applied in pursuance of the above notice. The case of *Ferguson v. Hely* (a) is directly in point, and was a decision of this very Court. We have brought ourselves within its principle by the offer of the letters of the defendant which are within our reach.

CHUTE
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Clarke, contra (with him *James Murphy*).

I myself was Counsel in *Ferguson v. Hely*. The state of the pleadings there was quite different from the present case, inasmuch as there were there two pleas—one a denial of the promise, the other a rescision of it, while here we have only one plea. This is a mere fishing application, for the purpose of getting at defendant's case. A plaintiff is not entitled to a disclosure of his adversary's case. The only passage in the affidavit of which anything can be made is that allusion to the letter, in which it is said—"I have documents "in your client's handwriting which I am advised will certainly "cause your case to fail." As, however, there is no plea of rescision, this does not afford a ground. As to the allegation that she is apprehensive that a portion only of her letters will be read, that is mere moonshine on the face of it. In *Hamer v. Sowerby* (b) a similar application was refused by the English Queen's Bench.

James Murphy.

In *Ferguson v. Hely* there was sworn to be no evidence to prove the rescision, but the letters that were in the hands of the other side; and it is on that account distinguishable from this case. The true principle applicable to such cases is to be found in *Wigram on Discovery*, p. 25, where he says:—"The object of a Court of "Equity, in compelling discovery, is, to enable itself, or some "other Court, to decide on matters in dispute between the parties; "and the right of discovery is limited by the purpose with reference "to which alone it is conferred, and will not, for that reason, extend "beyond the exigencies of the question or questions about to be "tried. To determine what such question or questions may be, the "ordinary rules of practice (unconnected with the laws of discovery) "must be separately consulted." Clearly the present application does not fall within the limits of the rule. In page 264, paragraph 246, of the same work, we read, "A plaintiff is not entitled to

(a) 10 Ir. Jur., N. S. 34.

(b) 3 L. T., N. S. 734.

M. T. 1865. "exact from the defendant any discovery exclusively relating to *his*
Common Pleas. "case, or of the evidence by means of which that case is to be
 CHUTE "established." The plaintiff does not swear that the information
 v. for which she seeks does not relate exclusively to defendant's case.
 BLENNER- The case of *Hamer v. Sowerby* has been already referred to.
 HASSET.

Whiteside, in reply.

The statement that the letter referred to is to defeat the plaintiff's case must be supposed, in the absence of any plea of rescision, to refer to a letter bearing upon the contract; and to a discovery of this we are clearly entitled.

Cur. adv. vult.

On Saturday, 25th of November 1865, the Court granted the order, CHRISTIAN, J., calling the attention of Counsel to the case of *Stone v. Strange* (a).

The order was as follows:—It is ordered by the Court, that the defendant do furnish to the plaintiff, or her attorney, on oath, on or before the 7th of December next, true copies of all letters of the defendant in his custody or procurement, on payment of the usual scrivenerly charges for the same, together with copies of the envelopes (if any) in which such letters were inclosed. And let the plaintiff also, in the said period, furnish to the defendant, or to his attorney, true copies of all letters of the defendant in her custody, power or procurement, together with copies of the envelopes (if any) in which same were inclosed, on payment of the usual scrivenerly charges; with liberty to either party (on giving to the other twenty-four hours' notice) to inspect the original of the said letters and envelopes, and compare the copies so furnished with the same. Costs of the motion to be costs in the cause.

(a) 3 H. & C. 541.

T. T. 1864.
Queen's Bench

QUANE v. FRAZER.*

(*Queen's Bench.*)

May 31.
 June 1, 13.

THIS was an action of negligence, against an attorney. The summons and plaint stated a retainer of the defendant by the plaintiff as her attorney, for certain fees, to advise her as to the purchase of certain lands in the county of Limerick, for a sum of £850; that it was the defendant's duty to advise her correctly in respect thereof; that the defendant had at the time notice of a previous purchase; that he did not communicate that knowledge to the plaintiff, and encouraged her to purchase these lands, and that she did in fact purchase them; that she paid to the defendant money for preparing a conveyance; that afterwards proceedings were taken in Equity against the plaintiff; and that her purchase of the lands was set aside with costs. For his negligence, the plaintiff claimed against the defendant, as damages, £1000.

The learned Judge who tried the case ruled at the trial that the plaintiff had no right to recover from the defendant any larger sum than she had paid him for the preparation of the deed of conveyance. The jury returned a verdict for the plaintiff for £10, and one shilling costs.

On taxation of the costs, the Taxing-officer allowed the plaintiff only half costs. From that decision—

Action for negligence.

The summons and plaint alleged retainer of the defendant by plaintiff as her attorney; a duty of the defendant, and the violation thereof. Plaintiff recovered a verdict for £10 and costs. The Taxing-Master refused to allow more than half costs, holding the action one "connected with contract." On appeal against this ruling—

Held, affirming the ruling, that the action was an action of contract.

O'Riordan, on behalf of the plaintiff, now moved, by way of appeal, "that the Taxing-officer do review his taxation, and tax "the costs upon the principle that the plaintiff is entitled to the full "costs as between party and party, instead of half costs."

This was an action for a wrong disconnected with contract. There is not on the face of the plaint anything about a contract; and the action was brought against the defendant by reason of the relation of attorney and client. Before the enactment of the Common Law Procedure Amendment Act (Ireland), 1853, s. 243, the plaintiff was entitled to full costs; and that section does not profess to deal with actions generally.—[O'BRIEN, J. Do you argue that the Legislature, intending to provide for all cases, left out a class of cases which partake both of contract and *tort*?]—The 243rd section does not enact that *all* actions shall come within its provisions.

* Before LEFROY, C. J., and O'BRIEN and FITZGERALD, JJ.

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Kerr v. Midland Great Western Railway Co. (a) does not apply, because the Court there could not say that the action was framed in anything but contract. The declaration in that case was framed differently from the one in *Tattan v. Great Western Railway Co.* (b); which case was decided on a statute (13 & 14 Vic., c. 61, s. 11) that puts on one side all actions of *tort*, and on the other all actions of *assumpsit*. The argument derived from that statute, coupled with the 19 & 20 Vic., c. 108, s. 30, was, that the action against the carrier must be deemed to be in contract; but the Court held otherwise. *Legge v. Tucker* (c) is in point.—[FITZGERALD, J. I do not understand in this case any breach of duty beyond the breach of the contract, which in the retainer is to use reasonable care and diligence.—O'BRIEN, J. Surely the meaning of retaining a man as an attorney is a contract.]—There should be a reward given in the case of an attorney or a surgeon.—[FITZGERALD, J. But here, what is the duty *ultra* the contract? The same rights spring from the duty and from the contract. In *Legge v. Tucker* the duty would not at the Common Law have been co-extensive with the contract. The contract was more extensive than the duty; and therefore it was necessary to shape the action in contract. Again, therefore, I ask what there is in this case which could not have been established in an action of contract?—Under the Common Law Procedure Amendment Act (Ireland), 1853, it is not necessary to use any particular form of action.]—But the substance of the different actions remains; and one must look at the action and its substance, in order to ascertain whether it is an action in contract or is an action in *tort*.—[O'BRIEN, J. But this action is for an injury at least *connected* with contract.]—Just so; and that is a class of actions not provided for in section 243, which provides for actions *disconnected* with contract. That section 243 is not exhaustive appears from the consideration that it does not provide for an action of detinue at all.—[FITZGERALD, J. Because it may either arise from contract, or be for a simple wrong.]—The case of *Keys v. Belfast and Ballymena Railway Co.* (d) cannot be reconciled with the other decisions.

James Murphy, contra.

This action, partaking the nature of both contract and *tort*, entitles the plaintiff to full costs: it is essentially founded on contract. In the words of Cockburn, C. J., in *Tattan v. The Great Western*

(a) 10 Ir. Com. Law Rep., App. xlv.

(b) 29 Law Jour., N. S., Q. B. 184; S. C., 6 Jur., N. S. 800.

(c) 1 H. & N. 500; S. C., 2 Jur., N. S. 1235. (d) 8 Ir. Com. Law Rep. 167.

Railway Co. (a), "The duty arises as soon as the contract is made, and is engrafted by the common law on the contract." Unless therefore a contract between an attorney and client is made, no duty is imposed on the attorney for the client. And then arises this absurdity—that, if the client avers, "I retained you for hire and reward, and you promised to use due diligence,"—that, being an action of contract, the plaintiff must recover £20, in order to entitle him to full costs; but, if the plaintiff does not aver that the retainer was for hire and reward, then the action would be founded on *tort*, and a verdict for £5 will entitle him to obtain full costs. This is, however, an action founded on the promise which the law implies. That the two classes in section 243 include all actions, appears further from the division of actions in schedule C into actions of contract, and actions for wrongs independent of contract; and meaning, by "actions of contract," "actions founded on contract."

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By the 9 & 10 *Vic.*, c. 95, s. 129, in England a plaintiff was deprived of costs if the verdict was for less than £20, when the action was founded on contract; or if a sum of less than £5 was recovered in an action founded on *tort*. If the word "founded" had remained in the later statute no question would arise. But that statute was superseded by the 13 & 14 *Vic.*, c. 61, s. 11, which deprived the plaintiff of costs. That statute provided for all actions of case, except in the case of judgment by default. Then came the 19 & 20 *Vic.*, c. 108, s. 30, which deprived a plaintiff, who recovered judgment by default, of costs, unless they were awarded to him by a Judge. The Court considered that that section left untouched altogether actions on the case, and applied only to the first part of the 13 & 14 *Vic.*, c. 61, s. 11.—[LEFROY, C. J. But *assumpsit* was originally an action *on the case*, just such as *trover*. There were some cases in which a plaintiff might declare in *assumpsit* for breach of contract, or in *tort* for negligence in the performance of the contract.]—Those are almost the very words of Tindal, C. J., in *Boorman v. Brown (b)* :—"That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either *assumpsit* or case upon *tort*, is not disputed." Again, page 526, he said :—"The principle in all these cases would seem to be, that the contract creates a duty; and the neglect to perform that duty, or the non-feasance, is a ground of action upon a *tort*." That statement of the law was substantially approved

(a) 29 Law Jour., Q. B., N. S. 185.

(b) 3 Q. B. 525.

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in *Morgan v. Ravey* (a). Therefore an action against an attorney differs nothing from an action against a surgeon, or against any other person. According as an averment of the promise is introduced or omitted, the action becomes one of *assumpsit*, or of case. In *Morgan v. Ravey*, Channel, B., limited the rule in this way:—"That a plaintiff cannot, by changing the form, make the defendant "responsible in the one action, when he would not have been "responsible in the other."—[O'BRIEN, J. That limitation was in fact introduced to avoid the absurdity that, in one shape of action the plaintiff might recover full costs, and not in the other, though that other was founded on precisely the same state of facts.]—Just so.—[LEFROY, C. J. And the qualifications as to costs were made in ease and relief of defendants.]—Yes; and this case cannot be distinguished from *Kerr v. Midland Great Western Railway Co.* (b); for the two cases state identically the same cause of action, if the words "common carrier" were substituted for "attorney." By leaving out the words "promise and agree," the section might be evaded, and great injustice done. There is no English Act which uses the phrase "disconnected with contract."—[FITZGERALD, J. The strength of your case is, that the section means to provide for *all* classes of cases. In which class would you place an action of debt against a tenant for double value?—When that case arises the Court will decide it.—[FITZGERALD, J. Where would you place an action of debt against a Sheriff?—I need not push my argument beyond this, that all actions *connected with contract* are included in the first part of the section, while all actions *disconnected with contract* are provided for in the second part of it. Then the question is at end, because this action is manifestly an action *connected with contract*.—[FITZGERALD, J. What is the true interpretation of the phrase "disconnected with contract"? for really I do not understand it.]—It means "not founded on contract."—[LEFROY, C. J. Or, could the phrase mean actions in which you would have no choice between suing in one form of action or the other?—O'BRIEN, J. The first part of the section means that the *right of action* arises from the contract.—LEFROY, C. J. The true principle seems to be that the plaintiff shall not, *by his allegation*, onerate his adversary with costs.]—The English Act certainly meant to provide for *all* classes of actions.—[FITZGERALD, J. In cases of common carriers and attorneys, we are dealing with classes of persons from whose position there arises a duty wholly independent of contract. A common carrier is bound to take care of all my goods that come to his hands, although there is no contract

(a) 6 H. & N. 265.

(b) 10 Ir. Com. Law Rep., App. xlv.

between him and me.]—But that duty is not *entirely* independent of contract.—[FITZGERALD, J. But a common carrier who gets my goods, no matter who gives them to him, is bound to take care of them. So, in the case of an attorney, he holds himself out to the public as a person who acts with skill and diligence, and promises that he will so act.]—Yes, for those who employ him.—[O'BRIEN, J. But the question is, whether his undertaking to act at all is not a contract?]*Tattan v. The Great Western Railway Co.* was, though brought against common carriers, held to be founded on the common law duty independently of contract.—[FITZGERALD, J. The way in which I read the judgment of Cockburn, C. J., in that case is, that he regretted having to decide with the plaintiff. But the plaintiff had been given the option to bring his action in either of two forms—either upon the common law duty or upon the contract; and the statute enacted that he should have his costs.]—But that case was decided on the later Act.

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O'Riordan, in reply.

The Legislature has not professed to divide *all* actions into two classes, nor to relieve defendants. *Tattan v. The Great Western Railway Co.* decided that the plaintiff might bring his action in tort, if he pleased. Here, likewise, the plaintiff was entitled to frame his action in tort, and to enjoy the benefit of the decision in that case. *Kerr v. Midland Great Western Railway Co.* was decided before *Tattan v. Great Western Railway Co.*, otherwise it would have overruled that case. The judgment of Monahan, C. J., went very much on the frame of the count, as not being distinctly in either contract or tort.—[LEFROY, C. J. What interpretation do you give to the words "disconnected with contract?"]—The first part of the 243rd section deals merely with cases of contract; and the latter part deals with actions of pure tort. The present case is a *casus omissus*, and actions of detinue is another; and yet in it a verdict for one shilling gives full costs.—[FITZGERALD, J. There are several others also.—O'BRIEN, J., pointed out that the words in schedule C, "wrongs independent of contract," greatly resemble those in the 243rd section, "wrongs disconnected with contract."—FITZGERALD, J. The argument drawn from that schedule cuts both ways, because the instances given of actions of contract are of actions of pure contract.]—The forms given in the schedule are merely given as illustrations, and are not intended to do away with any rights.—[FITZGERALD, J. Did you look back to the repealed section of the Civil Bill Act, for which the section in the Common Law Procedure Amendment Act (Ireland), 1853, has been substituted?]*—No. In*

T. T. 1864. *Legge v. Tucker* the action was framed in tort, in order to evade the statute; and there the Court held it could not be done. Actions of detinue are plainly not within section 243; and the Court has only to deal with its plain words, which are satisfied by actions of contract, and actions of pure tort disconnected with contract; leaving unprovided for the class of mixed actions. *Morgan v. Ravey* has no bearing on this case, because the observation of Channel, B., goes only to this extent, that a plaintiff cannot bring in one form an action which must be brought in another. But that decision leaves untouched altogether actions of this mixed nature.

Cur. adv. vult.

June 13.

O'BRIEN, J.

In this case we are of opinion that plaintiff's application should be refused; and my LORD CHIEF JUSTICE, who was present during the argument, has stated to us that he concurs in that conclusion. The application was for the purpose of reviewing Master Colles's taxation of costs, in an action brought by a client against her attorney, for alleged negligence with respect to the purchase of certain lands, in which he acted for her. It appears that subsequently the title was found to be defective, and that her purchase was set aside. The summons and plaint claimed a considerable sum for damages, but Chief Justice Monahan, before whom her case was tried, ruled that her claim for damages should be confined to the amount which she was actually out of pocket by the transaction, and she recovered a verdict for only *ten* pounds. The Taxing-Master held, that this was a case in which, under the 243rd section of the Common Law Procedure Act, the plaintiff was only entitled to half costs, as the amount which she recovered was less than *twenty* pounds; and the present application is by way of appeal from such ruling. That section provides, "That in case the plaintiff in *any* *action of contract* (except for breach of promise of marriage) shall recover, exclusive of costs, *less than twenty pounds*; or in *any* action for any wrong or *injury disconnected with contract* (except replevin, or for slander, libel, malicious prosecution, seduction or criminal conversation), a sum *not exceeding five pounds*, the plaintiff in any such action shall be entitled to no more than *one-half* of the ordinary costs, unless the action has been brought for the purpose of trying a right to property more extensive than *the sum sued for*." The Master held, that the present action was to be considered as one within the *first* branch of the above provision—namely, "*an action of contract*," and not an action within the second branch for "*wrong or injury disconnected with con-*

tract;" and we are of opinion that such ruling was in accordance with the true construction of the statute. It is true, that the ground of complaint stated in the pleading is the negligence of defendant, in his conduct of plaintiff's business, as her attorney; and under the rules of pleading, which existed previous to the Common Law Procedure Act of 1853, it would have been open to a party having such a ground of complaint to have framed his action either *in assumpsit* on the contract implied in the relation of attorney and client, or *in case* for breach of the duty arising from that relation and implied contract. But the Common Law Procedure Act has abolished the technical forms of personal actions, and entitles a party to frame his summons and plaint as he may be advised, provided it discloses a good ground of action. In the present case the summons and plaint states the retainer by the plaintiff of the defendant as her attorney, for certain fees, to advise her in her purchase; and that statement implies that there was a contract between them, that in consideration of such retainer and fees he should act in that business with due care and diligence. It is clear, therefore (and indeed was admitted by plaintiff's Counsel, in the in the argument), that this action is for a "*wrong connected with contract*;" and, therefore, does not come within the second branch of the provision of the statute under which, in actions "for any wrong or injury *disconnected* with contract," the plaintiff is entitled to his full costs if he recover any sum exceeding five pounds. But plaintiff's Counsel also contends, that this action is not an "*action of contract*" within the first branch of the proviso in the 243rd section; that such proviso deals only with two classes of action—viz., actions on contract, and actions for any wrong or injury disconnected with contract; and that, therefore, as the present action does not come within either branch of the proviso, it is not affected by it; and that, accordingly, the plaintiff (without reference to the amount of damages she has recovered) is entitled to her full costs, as she would have been before the passing of the Act, and should get her full costs if she had only recovered one shilling damages. In our opinion, however, this argument is not well-founded. The first part of the 243rd section contains a general regulation for the amount of costs of all proceedings under the Act. Then follows the proviso that, in actions "*of contract*," and actions "*for any wrong or injury disconnected with contract*" (except certain actions therein particularly specified), the plaintiff should only be entitled to half costs, except he recovered twenty pounds in the former, or over five pounds in the latter. It was, we think, the manifest intention of the Legislature that the costs of all personal

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actions, either of contract or of tort, should be subjected to that provision, except of such actions as were particularly exempted from its operation; whereas, according to the construction contended for by plaintiff's Counsel, that numerous class of actions, in which the wrong complained of arises from the breach of a duty imposed by contract, might also be exempted from it, if the pleader framed the summons and plaint in one form instead of another. The case of *Tatton v. The Great Western Railway Company* (a) was relied on by plaintiff's Counsel. In that case an action was brought against defendants, as common carriers, for the loss of goods delivered to them; defendants suffered judgment by default; on a writ of inquiry, plaintiff got a verdict for £11. 5s. damages; and the question was, whether the action should be considered as an action of contract, so as to deprive plaintiff of his costs under the English Act, 19 & 20 Vic., c. 108, s. 30, which provides, that if *an action of contract* be brought in a Superior Court to recover a sum not exceeding £20, and the defendant suffer judgment by default, then that the plaintiff should recover no costs. The Court held, that the action was not to be considered as one of *contract* within the Act, and that accordingly plaintiff was entitled to his costs. But on referring to the report of the case, it will be seen that it was decided partly upon the ground that the action lay for a breach of duty, independent of all contract, and partly upon a comparison of the language of that statute with that of two previous English statutes (9 & 10 Vic., c. 95, s. 129, and 13 & 14 Vic., c. 61, s. 11). By the first of those Acts the plaintiff was deprived of his costs if he recovered less than £20 in an action *founded on contract*, or less than £5 in an action *founded on tort*. The language of this enactment, which referred to and dealt with the *causes of action*, instead of their forms, was varied in the subsequent Act (3 & 4 Vic., c. 61, s. 11), which referred in terms to the *forms of action*, and which provided that the plaintiff should be deprived of his costs in any action in covenant, debt, detinue or *assumpsit* (except breach of promise of marriage), if he did not recover a sum exceeding £20; or in any action in trespass, trover or case (except for malicious prosecution, libel, and some others specified) recover a sum exceeding £5, except in the case of judgment by default. The effect then of the Act of 19 & 20 Vic., c. 108, s. 30, on which the question in that case arose, was to put a judgment by default as to "*actions of contract*" in the same position as other recoveries; and the words "*actions of contract*" in that statute were to be construed with reference to the preceding statute, 13 & 14 Vic., c. 61, s. 11; the

(a) 29 Law Jour., Q. B. 185.

language of which (as Hill, J., remarked in his judgment) seemed to have been designedly changed from that of the original Act of 9 & 10 Vic., c. 95, s. 129, by using the names of *the different forms of action* instead of the words "actions founded on contract," or "*actions founded on tort*." In Ireland, however, by the Common Law Procedure Act, 1853, the special forms of personal actions have (as I have already observed) been abolished. We have in the case now before us to consider the cause or ground of action, and not its mere form; and we think, therefore, that the decision in *Tattan v. The Great Western Railway Co.* is no authority for the plaintiff in the present case. It will be seen that Cockburn, C. J., in his judgment, remarks on the anomalous position of the law under those English statutes, according to which a party who recovered on a certain cause of action might obtain or be deprived of his costs, according as he shaped his declaration in contract or in tort; an anomaly which, in our opinion, does not exist under the Irish Act. Defendant's Counsel have, on the other hand, relied on a case decided by the Common Pleas in Ireland (*Kerr v. The Midland Great Western Railway Co. (a)*), which appears an authority in his favour. In that case also the defendants were sued as common carriers, for not carrying within a reasonable time the plaintiff's sheep, which were delivered to them for that purpose; the plaintiff recovered only £14, and the Taxing-Master allowed him only half costs. An application was made by the plaintiff (as in this case) to review such taxation, but the Court upheld the Master's ruling; and it will be seen by the judgment of Monahan, C. J., that, with respect to the construction of the 243rd section of the Common Law Procedure Act of 1853, the Court were of opinion that the Legislature intended to include in the provisions of that section all cases in which a contract subsisted between the parties; and that, as forms of action had been abolished, the question to be considered was, what was the substantial *cause of action* between the parties, although, according to the former rules of pleading, the first count of the summons and plaint might have been regarded as a count in case. It appears to us that, on the authority of that decision, and according to the true construction of the 243rd section, the present application should be refused.*

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(a) 10 Ir. Com. Law Rep., App. xlv.

* The decision in above case was approved of and followed by the full Court of Queen's Bench in a subsequent case of *Galvin v. Midland Great Western Railway Co.* (4th of November 1865), in which that of *Kerr v. Midland Great Western Railway* was also cited and approved of.

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FITZGERALD, J.

I concur in the conclusion that the summons and plaint states a contract, and alleges a duty exactly co-extensive with the terms of that contract. That appears to me to be an action of contract within the meaning of the Common Law Procedure Act. If it could have been shown that the duty was more extensive than the contract, that would have altered my view.

DOHERTY v. M'DAID.*

H. T. 1866.

Jan. 31.

(Consolidated Chamber.)

A number of small debts, due by different persons to a judgment-debtor, may be included in one attachment order, under the garnishee section of the Common Law Procedure Act (1856), and a single conditional order to pay will also issue.

THIS was an application to Mr. Justice O'HAGAN, under the 19 & 20 *Vic.*, c. 113, s. 63, for an order that certain garnishees should appear before the Judge or Master, as such Judge should appoint, to show cause why they should not pay Hugh Doherty, the judgment creditor, certain debts due by them to James M'Daid, the judgment debtor. The plaintiff had, on the 12th of August 1865, recovered a judgment in the Court of Common Pleas for the sum of £85. 6s. 4d., including debts and costs. On the 31st of January last, O'HAGAN, J., had granted the usual order, attaching the eight different debts due by the following persons respectively to the defendant:—

£7 due by Daniel M'Gonigle, for money lent ;

£4 due by Cornelius M'Daid, do.;

£3 due by William Doherty, do.;

£5 due by Charles M'Gonigle, do.;

£4. 8s. 6d. due by John Doherty on foot of a civil bill decree, in hands of the Sheriff, not yet executed ;

£3. 12s. 6d. due by John Harkin, do.;

£6 due by Peggy Doherty for money lent.

On that occasion O'HAGAN, J., declined to make the conditional order *to pay* the debts so attached.

M'Conchy.

I hold in my hand an order of the Court of Exchequer, made in a precisely similar case. That order bears date the 12th of May

* O'HAGAN, J. (in Chamber.)

1863, and was made in the case of *Murphy v. Walsh*. That case is not reported. On that occasion, twenty-one different debts were attached by one order, and the further order against all the garnishees, to appear and show cause why they should not pay, was made at the same time, and included in the one ruling. The amount of the judgment there was £442. 17s. 3d., together with £7. 4s. 11d. for costs; and the debts attached varied in amount from £4 to £37. 6s. 1d. Since the date of the attaching order in the present case, the debts of £3 and £3. 12s. 6d., due by William Doherty and John Harkin respectively, have been paid to the plaintiff, and are not therefore to be included in the order.

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O'HAGAN, J. You may take the order.

Application granted.

WILLIS v. GILDEA.

(Common Pleas.)

M. T. 1865.

By bond, dated the 4th of January 1848, James Knox Gildea and Anthony Knox Gildea acknowledged themselves indebted to William Willis in the sum of £1303. 17s. 6d., on the following terms:—
 “The condition of the above obligation is such, that if the above bound
 “James Knox Gildea, his heirs, executors, or administrators, shall
 “and do well and truly pay, or cause to be paid, to the above named
 “William Willis, his executors, administrators, or assigns, the just
 “and full sum of £651. 18s. 11d. sterling, within nine calendar
 “months, to be computed from the date hereof, with interest in the
 “meantime from the date hereof until paid, at the rate of six
 “pounds per cent. per annum, without fraud or further delay; or,
 “in case the said James Knox Gildea shall die in the lifetime of the
 “said Anthony Knox Gildea, before the said debt and interest shall
 “be paid, and the said Anthony Knox Gildea shall become entitled
 “in possession to the lands and hereditaments of which the said
 “James Knox Gildea is now in possession as tenant for life, then,
 “if the above bounden Anthony Knox Gildea, his heirs, executors,
 “or administrators, shall and do well and truly pay, or cause to be

On motion at the suit of one of the conuzors of a judgment, of Michaelmas Term 1847, that the *ex parte* order for liberty to revive the judgment should be varied, the Court, upon its appearing that, by the condition of the bond and warrant by virtue of which the judgment was entered, he was only to become liable in the event of the death of his brother (the other conuzor) and of his succession to his brother's estate.

tate, directed that stay of execution, until the death of the brother and further order of the Court, should be marked upon the margin of the revived judgment, although no stay of execution appeared upon the original one.

M. T. 1865. "paid, unto the above-named William Willis, his executors, admi-
Common Pleas. nistrators, or assigns, the sum of £651. 18s. 11d., and interest as
 WILLIS "aforesaid, within the term of three years, to be computed from the
 v. "date hereof, in case he shall become entitled to the said lands
 GILDEA. "within that period, and if not, in case he shall become entitled
 "in possession to the said lands within that period; and if not then,
 "within six calendar months after he shall have so become entitled
 "in possession, without fraud or further delay; that the above obli-
 "gation to be void and of none effect, or else stand or remain in
 "full force and virtue in law.—Signed, sealed," &c.

Collateral with the bond was the usual warrant of attorney to confess judgment, and the condition therein followed the words of condition in the bond itself. Judgment was entered thereon in the Court of Common Pleas, as of Michaelmas Term 1847. No stay of execution till the death of Gildea appeared upon the judgment roll.

On the 11th of August 1865, on motion of the plaintiff, Mr. Justice O'HAGAN made an order for liberty to issue a writ of revivor.

Finch White, on the part of defendant, now moved, on notice, that, "the order made in this cause, on the 11th of August last, "giving the plaintiff liberty to issue a writ of revivor on foot of the "judgment herein, of Michaelmas Term 1847, may be set aside, or "that the entry of the said judgment may be amended, by adding "in the margin of the roll the words following, viz., 'with stay of "execution until the expiration of six calendar months after James "Knox Gildea the elder, brother of the conuzor, shall die, and the "conuzor shall become entitled to the possession of the lands, &c., "of which the said James Knox Gildea was seised on the 4th of "January 1848." The order which I seek to set aside was made absolute, in the first instance.* The object of the plaintiff in attempting to revive his judgment cannot be merely to keep the case out of the statute, because the cases of *Kennedy v. Whaley* (a) and *Gilman v. Chute* (b) establish that the Statute of Limitations does not begin to run until the time limited by the condition incorporated with the bond upon which a judgment is obtained. The reason why we are obliged to come into Court to make this motion, instead of pleading to the writ, is, that the matters upon which the present application is based do not afford a good defence, and might be demurred to; it being a rule of law that no plea to a revived judg-

(a) 12 Ir. Law Rep. 54.

(b) 11 Ir. Law Rep. 442.

* NOTE.—There were also affidavits of the plaintiff and defendant respectively, upon which, however, nothing subsequently turned.

ment shall be allowable which would have been a good defence to the original judgment. If, however, we were to allow the judgment to be revived, we may be concluded by the record from denying our present liability: *Sealy v. Lawder* (a). The only defences admissible are *nul tiel record*, release, payment, or the Statute of Limitations. I cannot plead any of those. As the Statute of Limitations has not yet begun to run, the only object that the plaintiff can have in reviving this judgment is, to be in a position to levy execution. This would manifestly be a gross perversion of the process of this Court; and yet, if the judgment be now unconditionally revived, there will be nothing to prevent the plaintiff from at once setting the Sheriff in motion. As our object is merely to protect ourselves, by carrying out the terms of the original contract, we have framed our notice of motion in the alternative, and pray that if the judgment be revived, the officer of the Court be directed to indorse a stay of execution upon the margin of the judgment roll. The case of *Banco v. Banco* (b) is a case where this course was adopted. We have obtained a copy of the revived judgment in that case from the Court of Exchequer; and it contains in the margin such a stay. There is a short note of the case in 1 *Ir. Law Rec., old series*, p. 236, under the title of *Banes v. Banes*. That was a case of a *post obit* bond; and the stay of execution was till after the death of the conuzor. In that case also there was no stay of execution on the original judgment.

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Jordan, in support of the rule.

There are two objects in reviving this judgment; first, to prevent the statute from running; and, secondly, to enable us to levy execution. I submit that this Court has no authority to interfere with us at this stage of the proceedings, and that the only courses open to the other side, if they think that they can make out a case, is to plead the facts that constitute that defence, or to apply to a Court of Equity for an injunction. The original judgment being in 1848, the Statute of Limitations would be a good plea in two years and a-half more; and this we wish to prevent.—[Having read the condition of the bond.]—The lands there mentioned are actually, at the present time, about being sold in the Landed Estates Court, at the petition of the defendant, so that what he is now doing will prevent the lands from ever coming into his possession; under these circumstances he is not entitled either to assistance from a Court of Equity nor to any favour at your hands; it being a well settled principle that, where a man, by his own act,

(a) Arm. M'C. & Ogle. 64.

(b) Exch., Hil. 1828.

M. T. 1865. prevents a condition from taking effect, he shall not be allowed to shelter himself under that condition.

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WILLIS

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GILDEA.

Per Curiam.

Let the judgment be revived, but let stay of execution till the death of Anthony Knox Gildea and the further order of the Court be marked upon the judgment roll. Let the defendant also have his costs.

The order was as follows:—It is ordered by the Court, that the first portion of the motion be refused, and accordingly, that the order pronounced in this cause by the Right Honorable Mr. Justice O'HAGAN on the 11th of August last do stand; and it is further ordered, that an entry be made on the judgment roll, staying execution in the cause until six months after the death of James Knox Gildea, the elder brother of the conuzor of the judgment, and until the further order of this Court. And it is further ordered, that the plaintiff do pay to the defendant the costs of this motion, when same shall be taxed and ascertained.

Motion granted with costs.

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CARRIER.

A sent a parcel from Belfast, by the Belfast Junction Railway Company, to Drogheda, carriage paid, directed "Mr. Patrick M'Bride, Virginia, per rail to Drogheda, thence per mail-car to Virginia." B, a common carrier, conveyed parcels from Kells station, on the Drogheda and Kells railway line, to Virginia. Notwithstanding cautions from A to both the Kells Railway Company and to B, not to convey parcels directed as above, the Kells Railway Company and B persisted in conveying to Virginia parcels addressed as above by A.

Upon the refusal of A to pay for, and refusal to B to deliver to him, a parcel brought to Virginia *via* Kells, and thence per B's car—

Held, that it was not the duty of B, as a common carrier, to convey the parcels in question; that B had no lien upon the parcel for its carriage, as the direction upon the parcel, and the cautions given to him by A, constituted express notice by A that his parcels should not be carried by that route. B was in the position of an innkeeper, receiving the horses of a guest of which he knows the guest is not the owner.

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The Dublin and Belfast Junction Railway Company were the agents of A for a specific purpose, viz., to forward the parcel by the route directed. Therefore, there was no privity between A and B relative to the carriage of the parcel. *E. Waugh v. Denham* 405

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The Grand-jury Act made certain notices to certain public bodies and officers a condition precedent to obtaining compensation for malicious burning. The C. Improvement Act, as far as the city of C. was concerned, transferred the jurisdiction as to compensation for malicious burning to the Town-council, and introduced various changes as to the powers and duties of the public bodies and officers mentioned in the former Act, which rendered an exact compliance with its provisions impossible. A, having applied to the Town-council of C. for compensation, was required to prove the service of these notices; and this decision was affirmed by the Recorder. A now applied for a *certiorari*.

Held that, though compliance *modo et forma* with some of the notice provisions had become impossible, yet those provisions had an ulterior object, with respect to which compliance might still be had in substance.

Held also that, though the performance of *all* the notice provisions might be rendered impracticable by subsequent legislation, the performance of

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Held, bad, as it was the duty of the Justices to make the selection of the penalties.

Held also, that, though bad in part and good in part, the sentence could not be amended by omitting the part bad, inasmuch as the adjudication was not an *order* but a *conviction*. *Q. B. Regina v. Justices of Wicklow* 23

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On appeal against this ruling—

Held, affirming the ruling, that the action was an action of contract. *Q. B. Quane v. Frazer App. xiii*

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A defendant in a criminal information challenged the array of jurors, on the following grounds:—First; that the jurors were summoned in virtue of a writ of *feri facias* and *distringas*, and not according to the statute. Secondly; without a precept of the Judge of Assize. Thirdly; without six days' previous summons. Eighthly; that the Sheriff did not make out the special jury list properly, and that various officers of the county had violated their duties with regard to the jurors' list. A demurrer taken *ore tenus* to the challenge was allowed.

Held, that the demurrer was rightly allowed.

Held also, that the 3 & 4 W. 4, c. 91, s. 18, is directory, and not mandatory.

Semble (*per* HAYES, J.)—That, where the challenger relies upon specific facts, as the omission of particular names from the jury panel, his pleading ought to give the names.

Semble also (*per* HAYES, J.)—That the process of *venire* and *distringas* is not abolished by the Common Law Procedure Act 1853, for criminal proceedings.

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A, B, C and D were brought before a J. P., in custody, and E being sworn by the Petty Sessions clerk, was examined by him in the presence of the prisoners, and of the Justice, as to certain alleged acts of the said A, B, C and D. The Petty Sessions clerk took down the statements of E in writing; read it over to E, in the presence and hearing of the prisoners, of whom A and B cross-examined E. To the written statement so read E affixed his mark. E having died before the trial, this statement was tendered in evidence against the prisoners, under the 14 & 15 Vic., c. 93, s. 14. It began:—"The information of E, of, &c. Informant being duly sworn on his oath deposed as follows." It was signed by the J. P. before whom it was taken. Prisoners' Counsel objected to the admission of the document in evidence; and the point being reserved on the following objections:—

First; that the deposition ought to be taken by the J. P. himself.

Secondly; that it had no caption.

Thirdly; that nothing to show on its face that the prisoner had been made aware of the charge on which he was in custody.

Parol evidence was given that the

document had been read over to the prisoners previous to the cross-examination.

Held (dissentientibus O'HAGAN, J., HUGHES, B., HAYES, and CHRISTIAN, JJ.), that the document was not admissible, as it was not preceded by a statement of the charge to which it had reference.

Held (per CHRISTIAN and HAYES, JJ., HUGHES, B., and O'HAGAN, J.), that all the statute requires is, that the charge should be made to the Magistrate before he proceeds to take the deposition.

Semble—That the Justice need not take down the deposition himself, but it is sufficient if he is present and attending to the work of the clerk. Cr. Ap. *Regina v. Galvin* 452

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A brought an ejectment for non-payment of rent. Comprised in the bill of particulars was one half-year's rent due on the 1st of November 1863. The defendant pleaded that, after said half-year's rent became due, the plaintiff

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had brought an action for money due for use and occupation of the said premises, and had indorsed the said item in the writ in that case, and had recovered judgment in said action for the sum of, &c., which included the said first item in the plaintiff's second writ, that execution had been had thereon, and the Sheriff had paid into Court £125. 3s. 3d., which the said defendant was entitled to have applied in part satisfaction of the aforesaid judgment. The plaintiff demurred.

Held, that the defence was bad.

Held (by FITZGERALD, J.)—That the remedies of a landlord by personal action for non-payment of rent, and by ejectment for the same cause, are distinct, and not co-extensive.

Held also (by FITZGERALD, J.)—That the principle *transit in rem judicatam* only affects a merger of the remedy, and does not destroy the right of action.

Quære (by FITZGERALD, J.)—Whether, under *Armstrong v. Turquand* (9 Ir. Com. Law Rep., p. 32), the Court can on demurrer look at a judgment and bill of particulars not set out on the record? Q.B. *Wakefield v. Smythe* 173

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To a count in contract for not granting a lease in pursuance of an agreement, averring readiness and willingness on the part of the plaintiff to perform the contract, the defendant pleaded that the plaintiff was not always ready and willing to perform the contract on his part. The plaintiff contained other counts for false representation and fraudulent concealment by the defendant of the existence of the said agreement, by reason whereof the plaintiff had permitted judgment to go by default in an action of ejectment, brought to recover the possession of the lands, the subject of the agreement, of which the plaintiff was

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tenant from year to year to the defendant.

Replication—That the defendant ought not to be permitted to plead the defence, because, the plaintiff says that his not being ready and willing in that behalf arose from and was occasioned by the circumstances of false and fraudulent representation and concealment on the defendant's part, and of ignorance of the said agreement and his rights thereunder on the plaintiff's part, as particularly set forth in the second, third and fourth counts of the said plaint.

Held, on demurrer, that the replication was bad, both as a replication by way of estoppel and as a departure.

Held also, that the averment of readiness and willingness in the first count was a traversable averment; and therefore that the plea was good. C. P. *Archbold v. Earl of Howth*

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FEE-FARM GRANT.

"The Landlord and Tenant Law Amendment (Ireland) 1860," 23 and 24 Vic., c. 154, is not retrospective; consequently covenants contained in fee-farm grants, made before it came into force, viz., the 1st day of January 1861, are not affected by it.

Chute v. Busteed (15 Ir. Com. Law Rep. 115) overruled. Ex. Ch. *Chute v. Busteed*

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FORGERY.

V. was indicted for uttering certain forged orders for the payment of money, and convicted. He had fraudulently obtained certain forms of

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post-office orders from the office at N.; and also some with the N. stamp affixed. These orders being filled up, and signed G. J., "pro-postmaster," there being no one of the name of G. J. at N., were uttered by V. in payment for goods at D. No letters of advice were forwarded to D.

Held (*dubitante* PIGOT, C. B.), that V. was rightly convicted.

H. and S. were joined in the same indictment and convicted. They had gone to the shop where V. uttered the orders, remaining outside in a cab, so situated that they could not see or be seen by the people in the shop. They had previously accompanied V. to another shop, where he failed to get change for the orders; and they assisted V. in taking away the goods obtained at the second shop.

Held, that, though they were not in the cab for the purpose of taking part in aiding or assisting in the actual act of uttering, they were rightly convicted. Crim. Ap. *Regina v. Vanderstein*

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GARNISHEE ORDER.

A number of small debts, due by different persons to a judgment debtor, may be included in one attachment order, under the garnishee section of the Common Law Procedure Act (1856) and a single conditional order to pay will also issue. Consol. Ch. *Doherty v. M'Daid*

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HABEAS CORPUS.

Habeas corpus—The parties to whom a writ of *habeas corpus* sued out by

the father of a male infant, was addressed, returned that the infant at the time of the issuing of the writ was over fourteen years of age and under sixteen.

Held (*dissentiente* O'BRIEN, J.), that the father's application must be refused, inasmuch as at the age of fourteen a male infant is at liberty to exercise a discretion as to his own place of abode.

Held, by O'BRIEN, J.—That the guardianship of the father is more extensive than that of the mother.

That the *guardianship by nature* is not now limited to the eldest son, but extends to all the children alike.

That, though the *guardianship by nurture* terminates at the age of fourteen in all cases, that of the father *by nature* continues until twenty-one.

That infants of both sexes may choose their place of residence at the age of discretion.

That the age of discretion for males and females is sixteen years of age.

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A lease demised a "mill, together with the dwelling-house, sheds, out-offices, and caretaker's lodge belonging thereto, to hold the said demised premises, with the rights, members, and appurtenances thereunto belonging or in anywise appertaining."

Held, that a piece of ground, which had been always occupied by the former tenants of the mill and dwelling-house, but which was not necessary to the enjoyment of either, did not pass. C. P. *Jones v. Whelan* 495

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PUBLICATION OF LIBEL.

The rule that the publication of a fair and correct report of proceedings taking place in a Court of Justice is privileged, extends to the record of a judgment entered up on a warrant of attorney. But the

publication must be correct, and without inference or comment.

A publication called "The Black List," professing to contain extracts from the Register of Judgments, set out the particulars of the judgments in separate columns. The columns containing the names of the persons against whom, and by whom, the judgments had been entered up were headed respectively "debtors' names" and "creditor."

A plaint contained a count for libel, stating that A had recovered a judgment against the plaintiff, and that on the 19th of May 1860 the plaintiff had paid off the judgment; the count then set out the libel, which consisted of an extract of that judgment, published in "The Black List" of the 24th of May 1860, and added the following innuendo,—“Meaning thereby that the said judgment had been recovered against the plaintiff, and was then an existing liability against his estate and effects; and that the said A was then a creditor of the plaintiff.”

Defence—That, before the publication complained of, the said A duly obtained a judgment against the plaintiff (stating the particulars of the judgment), and said judgment was duly enrolled and of record in said Court, and duly registered, and was not annulled or vacated or satisfied on record at the time of the publication; and that the said publication was a matter so appearing of record, and registered as aforesaid.

This defence held bad on demurrer.
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The 68th section of the Merchant Shipping Act 1862, requires a shipowner, in order to preserve his lien

for freight on goods after they have been discharged from a ship, to serve a notice of his claim on the wharfinger *at the time* when the goods are landed; and the subsequent sections prescribe a course of procedure which the wharfinger is to adopt, after such notice shall have been given, in order to liberate the goods from the lien and discharge the claim for freight.

A cargo of timber, consigned to A, was discharged at the wharfs of B, and the landing of the goods was completed on the 12th of October. On the 15th of October following, C, who claimed to be owner of the ship, served a notice on B of his claim for freight, and required him to hold the goods until his claim was discharged.

B having retained the goods in pursuance of that notice, an action of detinue was brought against him by A.

On an application by B for an interpleader order under the 9 & 10 Vic., c. 64, on the ground that he could not proceed under the Merchant Shipping Act 1862, as the notice of the 15th of October was not served in time—

Held, per CHRISTIAN, J.—That, as the Merchant Shipping Act 1862 had imposed on the wharfinger the duty of resorting to a prescribed course of procedure in all cases coming within that statute, the question whether any particular case comes within the statute must be decided by the wharfinger on his own responsibility, and is not the proper subject for an interpleader between the consignee of the goods and the shipowners.

Held, per MONAHAN, C. J.—That, unless the case was one so clearly within the statute that the Court would on motion stay the action by A against B, the latter was entitled to an interpleader order; and that, as the Court were not prepared to do so in the present instance, the order should be granted. *C. P. Lawther v. Belfast Harbour Commissioners*

LORD CAMPBELL'S ACT

(9 & 10 Vic., c. 93.)

In an action, under Lord Campbell's Act (9 & 10 Vic., c. 93), by a widow, for damages upon the death of her son, aged fourteen, who had never earned any wages, but whose capabilities were valued at sixpence per day, the probability that he would have enabled his mother to earn more, or would have devoted part of his earnings to her support, is evidence to go to the jury upon the question of damages. The probability is increased by the past filial conduct of the deceased.

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1.—A was owner of land on the seashore, adjoining the land between high and low water mark. A Railway Co. proposed constructing their line between A's land and the sea, and deposited plans, including a perch of A's land, but not naming him as owner; and they subsequently disclaimed all intention to take any portion of A's land. The arbitrator refused to deal with A's land, or to allot any compensation for consequential damage arising from the works of the Company.

Held, that though no part of A's land was taken for the purposes of the Company he was entitled to have his claim for compensation considered by the arbitrator.

Semble—That A was entitled to

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compensation for the interruption of his right of access to the sea.

Semble, per HAYES, J.,—that with regard to the loss of A's light and prospect, the Company, being the grantees of the Crown, stood in a different position from that of the grantees of private individuals. *Q. B. Regina v. Rynd* 29

2. A certain road was vested in the Commissioners of Inland Navigation, up to the passing of the 11 & 12 G. 3 (*Ir.*), c. 31. That Act constituted the Grand Canal Co., and transferred the property in said road to the said Co.; said road never was the subject of a grand jury presentment. The Grand Canal Co. levied tolls from the public using the road.

Held, by O'BRIEN and HAYES, JJ. (*dissentiente* LEFROY, C. J.), that since the passing of the Rathmines Improvement Act incorporating the Towns Improvement Act, the liability to repair this road lay upon the Rathmines Commissioners.

Held also, by O'BRIEN and HAYES, JJ. (*dubitante* LEFROY, C. J., *dissentiente* FITZGERALD, J.), that the proper remedy to compel repair was by *mandamus*. *Q. B. Regina v. Rathmines Commissioners* 532

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MERCHANT SHIPPING ACT.

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A vessel duly registered at D., in Ireland, pursuant to the Merchant Shipping Act 1854, was in 1862 altered at L., in England, at which port a surveyor, appointed under the said Act, remeasured the ship, and certified his measurement to the registrar at that port. The owners objected to the mode of measurement, and now sought a *mandamus*, directed to the registrar at D., to have the vessel remeasured.

Held, that this Court had no jurisdiction, inasmuch as it is the registrar at the port of alteration, not that at the port of registry, who is required by the Act to measure the alterations.

Quere, by FITZGERALD, J.—Whether the owners could get a *mandamus* to have the vessel registered as a new one? Q. B. *Regina v. Gardiner* 349

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MORTGAGE.

By a mortgage deed, dated the 17th of October 1863, a Railway Company conveyed to the Secretary of the Public Works Loan Commissioners the line, "and also all the works, messuages and tenements, lands and hereditaments, property and estate, chattels and effects, of or belonging to the said Company, or which they are in anywise seised, possessed of, or entitled to, *or of or to which the said Company may at any time hereafter during the continuance of the security intended to be hereby made, be seised, possessed or entitled.* The 5 Vic., sess. 2, c. 9, s. 15, under which the loan to the Company was made, enacts that all mortgages taken by the Secretary of the Loan Commissioners shall be valid in law to pass all the estate or interest of such mortgagors, and for all other objects intended to be effected by such conveyances, except where otherwise expressly provided by such mortgages.

Held, that the mortgage to the Loan Commissioners did not include or affect property acquired by the Company subsequent to its execution. E. *Willinks v. Andrews* 201

PARTNERSHIP.

By agreement between J. and W. Wallace of the first part, and G. of the second part, G. bound himself, "in consideration of salary and otherwise,"

to do certain services for the parties of the first part, for the period of three years; and in consideration of the said services, the said J. and W. Wallace, "as co-partners, and as individuals, and their company firm," agreed to pay the said G. a salary of £500, and also that he should be entitled to a sum equivalent to one-third part of the free profits, for the said period, of the business of the first party; the said profits to be ascertained "by balance-sheets, to be prepared by the said first party, on the principle hitherto adopted by them," and at such periods as they should think proper. Before ascertaining the free profits, J. W. and W. W. to have £500 a-year each; the other sums payable to G. besides his salary not to be demandable by him during the period of his engagement, but to be payable by three equal instalments, as follows, &c. &c., with interest on the two last. The plaintiff was the drawer of certain bills accepted by J. and W. W., and sued the defendant as a partner in the firm.

Held, that the defendant was not a partner.

Semble, that "free profits" are equivalent to net profits. Q. B. *Shaw v Galt* 357

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POST-OFFICE ORDER.

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Held, that he was entitled to such an order, notwithstanding his denial of the contract. Q. B. *Cuffe v. Wilson* App. iv
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PRIVILEGED COMMUNICATION.

See *LIBEL*.

Privileged communication.—The plaintiff, an attorney, solicitor, and proctor, declared on a libel contained in a letter addressed to the Incorporated Society of Attorneys and Solicitors, of which plaintiff was a member, which letter charged the plaintiff with having accepted a retainer from the defendant in a suit then pending, and having afterwards taken up the opposite side of the same case. The defendant pleaded that he had engaged the plaintiff as solicitor in a certain matter, and the plaintiff afterwards, without notice to the defendant, took up the other side; that the defendant then named one R. to accept service of the writ for him, yet the plaintiff had the defendant served by a common bailiff, and that the defendant felt aggrieved by that conduct, and *bona fide* believed that the same was unprofessional and improper, and calculated to affect injuriously the character of the

profession to which plaintiff belonged; and that it was *the duty of the defendant, as a member of society, and as such interested in the good conduct of the members of said profession*, to bring the said conduct of the plaintiff under the notice of those who were *also interested in the good conduct of said members*, and had the power and duty of inquiring into the conduct of the said members, and of preventing the repetition of improper or unprofessional conduct; and that defendant *bona fide* believing that the said society had full power, and that it was the duty of the said society to make such inquiry as aforesaid into the conduct of the members of the said profession, and to prevent the repetition, &c., wrote the said letters, with the *bona fide* object of procuring such inquiry, and of preventing the repetition of such conduct.

Held (dissentiente FITZGERALD, J.), That the demurrer should be overruled.

Held, by FITZGERALD, J. (*dissentientibus O'BRIEN and HAYES, JJ.*)—That this plea did not show any personal interest in the defendant, nor any duty incumbent on him.

Held also, by FITZGERALD, J.—That an attorney is not justified in accepting an undertaking to accept service of a writ.

Held, by HAYES, J. (*dubitante LEFROY, C. J.*)—That the Courts have recognised the authority of the Law Society as to the supervision of the profession of attorneys.

Held also, by HAYES, J. (*dissentiente FITZGERALD, J.*)—That an attorney being, in the practice of his profession, a public man, every individual discharges a duty in doing his utmost to maintain the profession in its purity and integrity.

Held, by O'BRIEN, J. (*dissentiente FITZGERALD, J.*)—That, apart from social duty, the defendant had suffi-

cient interest in the matter of the complaint to sustain his plea.

Held also, by O'BRIEN, J.—That, where the plea shows grounds of privilege, though they are not the grounds of privilege the defendant has relied on in the plea, the plea is good. Q. B. *Hamerton v. Green* 77

PUBLICATION OF LIBEL.

See LIBEL.

A wrote a letter to the Poor-law Commissioners containing charges against B, a poor-rate collector. B resigned the collectorship. At a meeting of Poor-law Guardians to elect collectors for the ensuing year, B was appointed collector in his former district. The Commissioners refused to sanction his election, and by letter informed the Guardians of the charges made against him by A. The clerk of the union read this letter at the next meeting of the Guardians, and B recovered damages from A for thus publishing a libel upon him. At a subsequent meeting of the Guardians, relative to the election of a collector in place of B, at the request of a Guardian who had not been present at the preceding meeting, the clerk read again the letter from the Commissioners.

Held, reversing the decision of the Court of Exchequer, that the second reading of the letter containing the charges by A against B was not a publication of the libel by A. E. *Pope v. Coates* 156

PUBLIC COMPANY.

See MANDAMUS, l.

PUBLIC RATES.

In 1848 defendants, on behalf of the Crown, demised certain premises in D. to plaintiffs, for twenty-one years. The lease recited that the plaintiffs were in actual possession of the said premises, and provided that the plaintiffs were "not to be liable for or to

pay any rates or taxes whatever, charged or chargeable upon the said demised premises, or any part thereof, save and except their legal proportion of the poor-rate." The Dublin Corporation Waterworks Act 1861 authorised the Corporation of Dublin to levy, in place of certain rates theretofore levied, a rate to be called the "Domestic Water Rate," upon and from the occupiers of all houses within the borough of Dublin. This rate defendants refused to pay.

Held, that, as between lessor and lessee, the defendants were liable for the rate.

Held (per LEFROY, C. J., and O'BRIEN, J.), that "chargeable" has a future meaning.

Held (per O'BRIEN and FITZGERALD, JJ.), that the Domestic Water Rate, though not chargeable on the premises, is chargeable on the occupier in respect of his occupation, and so within the proviso.

Held also (per O'BRIEN, J., dissentiente FITZGERALD, J.), that the Domestic Water Rate was a continuance of certain rates existing at the time of the lease. Q. B. *Scovell v. Gardiner* 318

PUBLIC ROAD, DEDICATION OF.

See MANDAMUS, 2.

RAILWAY COMPANY.

See CARRIER.
LORD CAMPBELL'S ACT.
MANDAMUS, 1.
MORTGAGE.

REGISTRY OF SHIPS.

See MERCHANT SHIPPING ACT.

RENT, APPORTIONMENT OF.

See TITLE PARAMOUNT, 1, 2.

RENT, NON-PAYMENT OF.

See EJECTMENT.

SECURITY FOR COSTS.

REPLICATION.

See ESTOPPEL.

TITLE PARAMOUNT, 1.

REPRESENTATION.

See WARRANTY.

REVIVOR OF JUDGMENT.

On motion at the suit of one of the conuzors of a judgment, of Michaelmas Term 1847, that the *ex parte* order for liberty to revive the judgment should be varied, the Court, upon its appearing that, by the condition of the bond and warrant by virtue of which the judgment was entered, he was only to become liable in the event of the death of his brother (the other conuzor) and of his succession to his brother's estate, directed that stay of execution, until the death of the brother and further order of the Court, should be marked upon the margin of the revived judgment, although no stay of execution appeared upon the original one. C. P. *Willis v. Gildea* App. xxiii

SALARY.

See PARTNERSHIP.

SALE, BILL OF.

See PRACTICE, 5.

SECURITY FOR COSTS.

See PRACTICE, 1, 6, 8.

Under the 75th section of the Landlord and Tenant Act, defendant will not be required to give security for costs unless there is an "instrument in writing," binding upon both parties.

Semble (per HAYES, J.)—That the power to compel security for costs, &c., being discretionary, will not be exercised by the Court, where the terms of the alleged instrument are oppressive. Q. B. *Domville v. Black*

SHIPOWNER.

See LIEN.

SUMMARY JURISDICTION ACT.

See CONVICTION, 1, 2.

SUBLETTING.

The 10th section of the Landlord and Tenant Act renders *null and void* an assignment of lands held under a lease containing a clause prohibiting assignment, where the assent of the landlord is not testified in the mode prescribed by that section.

A, a lessee of lands held under the Court of Chancery, by an agreement containing a clause prohibiting assignment without the consent of the Master in Chancery or the receiver, assigned the lands to B without having obtained such consent, testified in the mode prescribed by the 10th section, and the lands were afterwards taken under an execution against A.

Held, that no interest passed under the assignment to B, and therefore that the lands were liable to be taken under an execution against A.

Semble—That, whatever may be the effect as between landlord and tenant of the landlord testifying his consent to the assignment, in the prescribed form, at a period subsequent to the date of the assignment, it cannot divest the intervening rights of third parties. *C. P. Butler v. Smith*

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TENANCY, DETERMINATION OF.

See PRACTICE, 6.

TITLE PARAMOUNT,
EVICTION BY.

1. The plaintiffs demised by indenture a large tract of waste land to D. and R., whose assignee the defendant was. Subsequently to the date of the lease it was discovered that the lessees had

never got possession of certain portions of the premises professed to be demised, and that those portions were in the possession of third parties, who claimed to be owners thereof in fee. One and a-half year's rent having become in arrear, an ejectment for non-payment of rent was brought, to which the defendant pleaded that, at the time of the making of the lease, certain persons (named in the plea) were, and thence hitherto have been, seised in fee, and in the lawful possession, occupation, and enjoyment of divers, to wit, 100,000 acres, parcel of the demised premises, whereby the lessees or the defendant, or any one claiming under the demise, did not or could not enter into possession of the said parcel, &c., but were kept excluded therefrom; and although the defendant, and those claiming under the demise, were ready and willing and desirous of entering, &c., yet that from the time of the demise they were kept out of the possession, &c., by the persons aforesaid.

Replication—That, the lease being by indenture, the defendant was estopped from pleading the defence.

Held, on demurrer, *per* MONAHAN, C. J., and KEOGH, J. (*dissentiente* CHRISTIAN, J.), that the replication was good.

That the defence was equivalent to a plea of eviction by title paramount; and therefore that the rent was apportionable.

That the case came within the operation of the 44th section of the Landlord and Tenant Act; and therefore that the plaintiffs could recover in the present action the possession of the portion of the demised premises which the defendant actually got possession of.

And that (following the case of *Mercer v. O'Reilly*, 13 Ir. Com. Law Rep. 153) the plaintiffs were entitled to have judgment for the apportioned rent.

Per CHRISTIAN, J.—That the repli-

cation was bad; for that, to constitute an estoppel between landlord and tenant, the possession by the tenant of the thing demised is essential.

That the defence was not equivalent to a plea of eviction by title paramount; but that the case came within the authority of *Neale v. McKenzie*, and that the rent was suspended.

And that, assuming the case came within the 44th section of the Landlord and Tenant Act, the plaintiffs should have pursued the terms of that section, and claimed only the portion of the demised premises which the defendant actually got possession of.

Neale v. McKenzie (2 Cr., M. and R. 84; S. C., 1 M. & W. 742) observed on. C. P. *The Irish Society v. Tyrrell* 249

2. To a plaint in ejectment for non-payment of rent alleging that one year's rent was due under a lease, the defendant pleaded that, by indenture, the father of the plaintiff demised the lands in the plaint mentioned to A, at a rent of £61. 15s. 0d. a-year; and that the said lease was duly assigned to the defendant, and that, before the making of the said lease, a portion of the said premises, amounting to two roods and twenty-six perches, was, and thence hitherto hath remained, the absolute property in fee of B. The defence then averred that neither the lessee nor the plaintiff had, at the time of making the lease, or since, any right or interest in the said portion of the premises, and that neither the lessee nor the defendant, nor any other person holding under the said demise, ever obtained any possession or enjoyment of the said portion, but that the same had always remained in the exclusive possession of B, and that the value of the said portion was £1. 14s. 0d. a-year; and the defence then averred tender of the residue of the rent.

Held, on demurrer, that this was a good defence, as it amounted to a plea of eviction by title paramount. C. P. *Domville v. Ward* 381

TRADER DEBTOR SUMMONS, MALICIOUSLY ISSUING.

The plaint alleged that the defendant W., having made demand of a certain sum of money on the plaintiff L., according to the form in the schedule to Irish Bankruptcy and Insolvency Act, falsely and maliciously, and without reasonable or probable cause, had a summons issued out of the Bankrupt Court for the personal appearance of L.; that the bankruptcy proceedings were determined in favour of L.; and that L. had suffered much in his credit and reputation, by having had to appear at the said Court. To this defendant demurred.

Held (*dissentiente* HAYES, J.) allowing the demurrer, that the plaint disclosed no cause of action.

Held also, that the suing out a commission of bankruptcy is not analogous to the proceeding by trader debtor summons.

Held (*per* HAYES, J.), that special damage was sufficiently averred.—Q. B. *Lunham v. Wakefield* 507

TRESPASS.

See LEASE.

UTTERING FORGED ORDER.

See FORGERY.

USE AND OCCUPATION.

See EJECTMENT FOR NON-PAYMENT OF RENT.

VENIRE.

See CRIMINAL INFORMATION.

VENUE.

Indictment contained the marginal

venue "King's County." No venue was stated in the body in the indictment. By the 14 & 15 Vic., c. 100, s. 23, "the jurisdiction named in the margin was to be taken to be the venue for all the facts stated in the body of the indictment." On the trial, it appeared that the offence was committed in the county of Tipperary, but within 500 yards of the King's county. The prisoner was convicted.

Held (dissentiente HAYES, J.), that the conviction was good. Q.B. Regina v. King 50

WARRANTY.

The plaintiff purchased from the defendant, a seed merchant, a quantity of rape seed. The defendant's salesman, who sold the seed to the plaintiff, knew at the time of the sale that it was required for the purpose of being sown, and producing a crop. The only express warranty proved was contained in the following evidence of the defendant's salesman, as to what passed between him and the plaintiff at the time of the sale:—"The plaintiff asked me if we had Dutch rape seed; I said we had, but of last year's importation; he asked me if it was good; I said I believed it to be so." The seed was in the defendant's store at the time; but the plaintiff did not examine it.

In an action to recover damages resulting from the failure of the crop, declaring on a warranty that, at the time of the sale, the seed was reasonably good growing seed, and fit and proper to be used for the purpose of sowing, and of producing a reasonably good and productive crop—

Held (dissentiente CHRISTIAN, J.), that, whether the representations made by the defendant's salesman amounted to an express warranty or not, they did not exclude an implied warranty of the effect declared on.

Held also (dissentiente CHRISTIAN, J.), that the rule that, "where a buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose," applies as well to natural products as to manufactured articles. C. P. Shields v. Cannon 588

WAIVER.

See PRACTICE, 1.

WATER RATE (DUBLIN).

See PUBLIC RATE.

WHARFINGER, DUTY OF.

See LIEN.

